

THE LONE AMERICAN DICTATORSHIP: HOW COURT DOCTRINE AND POLICE CULTURE LIMIT JUDICIAL OVERSIGHT OF THE POLICE USE OF DEADLY FORCE

JEREMY R. LACKS*

At approximately 8:00 P.M. on October 3, 1997, as plainclothes Philadelphia police officers Thomas Hood and Anthony Swinton patrolled the city in an unmarked police car, they were passed by a Mercury Mystique driving at a high speed in a nontraffic lane.¹ Both officers were relatively new to the job, and it was the first time either officer had been assigned to plainclothes duty. The officers followed the speeding vehicle until it stopped at a red light, at which point Officer Hood pulled around the car, blocking it perpendicularly in the intersection. The officers then got out of the vehicle and, according to them, displayed police badges and yelled, "Police, don't move."²

Inside, Dwayne Campbell, accompanied by his ten-year-old cousin Tierra Grazier in the back seat, saw the two men in plain clothes with guns drawn and panicked, believing he was being carjacked. Unable to hear the officers' proclamations that they were police, Campbell abruptly threw the car in reverse, striking another car, and drove forward in an effort to escape. Officer Hood, with Campbell's car suddenly barreling toward him, fired four shots at the vehicle. Three of the bullets struck Campbell, causing severe injury. The final shot, which struck Campbell in the back and traveled up his spinal column to the base of his brain, never to be removed, was not discharged until after the vehicle had pulled away from the direction of Officer Hood. The officers' actions violated Philadelphia police regulations against plainclothes officers making traffic stops as well as regulations against the per-

* J.D., New York University School of Law, 2008. Executive Articles Editor, *New York University Annual Survey of American Law*, 2007–08. I am sincerely grateful to Professor Jerome Skolnick for his insight and guidance and to the editors of the *New York University Annual Survey of American Law* for their hard work in bringing this Note to publication. Special thanks to my family for their constant support and inspiration.

1. Factual account drawn from Grazier *ex rel.* White v. City of Philadelphia, 328 F.3d 120, 122–23 (3d Cir. 2003); *see also* Brief of Appellants Dwayne Campbell and Tierra Grazier at 4, 6–11, *Grazier*, 328 F.3d 120 (No. 01-3284).

2. *Grazier*, 328 F.3d at 123.

pendicular stop maneuver. Whether Hood was constitutionally justified in firing shots at the car was left to a court to determine.

INTRODUCTION

Egon Bittner refers to the police as the state-instituted “mechanism for the distribution of non-negotiably coercive force.”³ Put another way, as Detective Jimmy McNulty, a fictional character on HBO’s crime drama *The Wire*, once observed, “The patrolling officer on his beat is the one true dictatorship in America.”⁴ In carrying out the essential function of seizing and detaining lawbreakers, police officers are entrusted with unparalleled responsibility and are sometimes forced to employ extreme measures to protect themselves and innocent bystanders, including the imposition of deadly force upon a suspect. Although traditionally recognized as legitimate, the police use of deadly force continues to raise significant practical and moral issues, which demand close attention from both the courts and legislatures in the United States.

While many police decisions to employ deadly force are legitimate, others just as certainly are not. Accordingly, despite universal recognition of the legitimacy of the police use of deadly force, the Supreme Court has, in the past thirty years, established the § 1983⁵ civil suit as the primary means by which citizens can enforce their constitutional rights and ensure that deadly force is employed only in a reasonable way.⁶ Moreover, in landmark cases like *Tennessee v. Garner*⁷ and *Graham v. Connor*,⁸ the Court has delineated federal standards for judging deadly force encounters, compelling both states and municipalities to articulate comprehensive deadly force policies for police departments.

Still, hundreds of Americans die from police bullets each year. In Philadelphia, one of the nation’s most populous cities, officer-involved civilian fatalities occur as frequently today as in the 1970s, a period preceding the adoption of judicial standards and departmental policies regulating deadly force.⁹ Furthermore, since *Gar-*

3. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 10 (1993) (quoting EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 46 (1970)).

4. *The Wire: Misgivings* (HBO television broadcast Nov. 19, 2006).

5. 42 U.S.C. § 1983 (2000).

6. See *infra* notes 32–86 and accompanying text.

7. 471 U.S. 1 (1985).

8. 490 U.S. 386 (1989).

9. Studies indicate that throughout the 1970s the Philadelphia Police Department averaged more than eighteen police-inflicted fatalities per year. See James J.

ner, Supreme Court case law on deadly force has become increasingly deferential to the decisions of individual officers and the policies of individual police departments. In such an environment, described by one critic as “shoot first . . . figure it out later,”¹⁰ it is necessary to question whether the federal cause of action remains a viable mechanism for ensuring the constitutional conduct of police.

This Note argues that the federal judiciary, as a consequence of a unique combination of the doctrinal features of § 1983 suits and the characteristics of contemporary police culture, has substantially relinquished its ability to oversee the police use of deadly force. Although the landmark cases of the 1980s demonstrated the courts’ ability to have a significant and lasting effect on law enforcement deadly force policy, the judiciary’s subsequent posture toward deadly force cases has increasingly empowered police management personnel to dictate how and when deadly force is reasonably wielded. In order to combat the negative effects of this trend, the courts should cultivate ways to reclaim a more active role in overseeing law enforcement policy on the use of deadly force.

Part I establishes that, though universally recognized as a legitimate and even indispensable tool of law enforcement, the police use of deadly force raises significant practical and moral concerns such that judicial oversight of the practice is both desirable and necessary. Part II traces the history of legal mechanisms erected in the United States to achieve the desired level of oversight over the practice and acknowledges the emergence of the federal § 1983 civil suit as the primary means of challenging the reasonableness of an officer’s decision to employ deadly force. Part III argues that the incidence of this phenomenon varies according to numerous factors, though evidence from the experience of the Philadelphia Police Department over the past three decades indicates that police management has been and continues to be a significant and possibly determinative factor in the frequency of the use of deadly force.

Then, in Part IV, this Note argue that three key doctrinal aspects of § 1983 suits limit federal courts’ ability to exercise effective supervision over the police use of deadly force: (a) the unique evidentiary disparity—favorable to police—that characterizes inci-

Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165, 183 (1988). Similarly, the rate of police-inflicted fatalities has risen steadily since 2001. See Robert Moran, *Killings by Police: Why the Sharp Rise?*, PHILA. INQUIRER, Jan. 21, 2007, at A1; Nancy Phillips, Barbara Boyer & Mark Fazlollah, *A Party, Police Gunfire—and Questions*, PHILA. INQUIRER, Jan. 6, 2008, at B1.

10. Phillips et al., *supra* note 9.

dents of the use of deadly force; (b) the temporal focus of the inquiry on the moment of decision to shoot as opposed to pre-seizure conduct; and (c) the punitive focus on the individual officer rather than police departments. Throughout this Part, the additional argument is made that specific phenomena of contemporary police culture, including the Blue Wall of Silence, the “rotten apple” syndrome, and rampant departmental emphasis on arrest statistics, further insulate police departments from court oversight and, moreover, render reliance on police self-regulation extremely troubling. In Part V, I aim to prescribe methods by which the federal courts can and should reclaim their important role in overseeing law enforcement deadly force policy. Finally, in Part VI, I conclude that, while court oversight can surely encourage the adoption of coherent deadly force policies, ultimate responsibility for maintaining the limited and constitutionally permissible use of deadly force lies with management in individual police departments and their commitment to training, discipline, and accountability.

Throughout this Note, I draw on historical, anecdotal, and statistical data on the use of deadly force by the Philadelphia Police Department. The City of Philadelphia’s experience with curbing the unrestrained use of deadly force provides an interesting case study, for multiple reasons. First, Philadelphia has experienced dramatic fluctuations in the frequency of officer-involved civilian fatalities over the past thirty years, making the city the subject of frequent assessment by researchers interested in explaining these trends. Second, failed litigation emanating out of Philadelphia aimed at achieving systematic reform in deadly force regulation illustrates the kind of jurisprudential constraints that traditionally limit the federal courts’ ability to oversee the use of deadly force. Finally, as incidents of deadly force in Philadelphia have spiked in recent years, an independent monitor of the city’s police department has recently published a lengthy report analyzing the upward trend and its causes, which is cited throughout this Note. While the analysis of Philadelphia is not meant to be presented as “typical,” the city’s unique experience does provide a useful lens through which to view the issue of the use of deadly force.

I.
PRACTICAL AND MORAL CONSEQUENCES OF THE
POLICE USE OF DEADLY FORCE

A. *Practical Costs of the Use of Deadly Force*

While few would deny that law enforcement's capacity to use deadly force is an indispensable component in an officer's arsenal, the frequency and nature of its use exact serious practical and moral costs on society. First, and most obvious, is the potential loss of life, whether justified or not, that arises in every deadly force encounter. According to Federal Bureau of Investigation ("FBI") crime statistics, between 2001 and 2005, 1800 suspected felons were killed by police in the line of duty, an average of 360 per year.¹¹ Certainly, the majority of the decisions to use deadly force against these suspects were justified;¹² just as surely, some were not.¹³

Suspect loss of life, however, is hardly the only practical concern. As a 2005 report issued by the Philadelphia Police Department's Integrity and Accountability Office ("IAO") notes: "The use of unauthorized deadly force grossly violates the public trust in the function of police officers, and places officers and the city at risk in subsequent civil or criminal proceedings."¹⁴ These costs are difficult to measure. One potential source, data on monetary payments paid to settle civil litigation, is particularly flawed. For instance, between 1998 and 2003, the City of Philadelphia incurred costs of just over \$1.9 million in litigation payments related to police shoot-

11. FBI, U.S. Dep't of Justice, Crime in the United States, Expanded Homicide Data, tbl.13 (2005), http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_13.html.

12. Indeed, the only killings included in the FBI's tabulation of suspected felons killed by police officers in the line of duty are those determined to be "justified" or "excusable." See FBI, U.S. Dep't of Justice, Crime in the United States, Expanded Homicide Data (2005), http://www.fbi.gov/ucr/05cius/offenses/expanded_information/murder_homicide.html.

13. See J. Michael McGuinness, *Law Enforcement Use of Force: The Objective Reasonableness Standards Under North Carolina and Federal Law*, 24 CAMPBELL L. REV. 201, 204 (2002) ("Many . . . split second decisions by officers to employ force are correct, while some are mistaken.").

14. INTEGRITY & ACCOUNTABILITY OFFICE, REPORT ON OFFICER-INVOLVED SHOOTINGS 4 (2005), <http://www.phila.gov/pac/pdfs/iao2004.pdf> [hereinafter IAO REPORT]. The Integrity and Accountability Office is "an independent monitor and auditor of Departmental policies, practices, and operations as they relate to the detection and control of corruption, misconduct, and the excessive use of force." *Id.* at 4 n.2. The IAO exercises independent judgment and has access to virtually all Department records and personnel in conducting studies and audits initiated at its discretion. *Id.*

ings.¹⁵ This accounts for just four percent of the total liability costs that the city incurred during the relevant period.¹⁶ By contrast, in 2004, New York City paid over three million dollars to settle just *one* suit, the 1999 killing of unarmed Guinean immigrant Amadou Diallo in the Bronx.¹⁷ Moreover, Philadelphia has paid nearly thirty million dollars over the past twenty years in relation to one notorious incident, the MOVE bombing of 1985.¹⁸ Thus, while not every police shooting exposes a municipality to substantial liability, the threat of one or numerous large payouts is ever-present.

Perhaps an even more troubling consequence of the unrestrained use of deadly force is the mistrust that it breeds between the citizenry and law enforcement, a mistrust that repeatedly has led to civil unrest and violence. As one study observes: "Almost every major civil insurrection that occurred in the United States in the past century was initiated or accelerated by the perception that the police had misused their right to use deadly force."¹⁹ In *Deadly Force: What We Know*, William A. Geller and Michael S. Scott attempt to offer a comprehensive list of those cities that have experienced "[r]iots precipitated by racial tensions stemming from police shootings and other problems for which the police were held at least partially responsible" since the 1960s.²⁰ A sampling of their list includes San Francisco, St. Louis, New York, Los Angeles, Chicago, Detroit, Durham (North Carolina), Memphis, Omaha, Cleveland, Dayton, Atlanta, Cambridge (Massachusetts), Rochester (New York), Newark, Miami, and Washington, D.C.²¹

15. *Id.* at 31.

16. *Id.*

17. Alan Feuer, *\$3 Million Deal in Police Killing of Diallo in '99*, N.Y. TIMES, Jan. 7, 2004, at A1.

18. Craig R. McCoy, *After 11 Years, Cost of Debacle Still Pile Up*, PHILA. INQUIRER, Mar. 31, 1996, at B11. On May 13, 1985, police dropped a bomb on a city row house in order to end a standoff with members of the radical MOVE organization. See Larry Eichel, *The MOVE Disaster: May 13, 1985, Day That Forever Changed the City: The Tragedy Left 11 Dead and 61 Homes in Ruins, but It No Longer Defines Philadelphia*, PHILA. INQUIRER, May 8, 2005, at A1. The bomb ignited a fire that destroyed an entire city block, killing eleven people, including five children, and leaving another 253 homeless. See *infra* notes 129–132 and accompanying text.

19. Colin Loftin, Brian Wiersma, David McDowall & Adam Dobrin, *Underreporting of Justifiable Homicides Committed by Police Officers in the United States, 1976–1998*, 93 AM. J. PUB. HEALTH 1117, 1117 (2003).

20. WILLIAM A. GELLER & MICHAEL S. SCOTT, *DEADLY FORCE: WHAT WE KNOW—A PRACTITIONER'S DESK REFERENCE ON POLICE-INVOLVED SHOOTINGS 1–10* (1992) (describing riots around the United States and their causes).

21. See *id.*

At times, a police shooting incident leads directly to violence; other times, violence flares in reaction to the perceived injustice of an adjudicatory decision absolving the offending officers, as famously occurred in Los Angeles following the Rodney King verdict in 1992.²² Although the Los Angeles Police Department (“LAPD”) officers who assaulted King did not use guns, the forces driving the citizen response were analogous nonetheless: the rioters perceived the police as having employed excessive, even deadly force, and they viewed the justice system as woefully unresponsive to this obvious fact.²³

The costs of such civil unrest are obvious and substantial. The Rodney King Riots claimed some fifty-three lives and cost the City of Los Angeles billions of dollars in property damage.²⁴ In addition to these tangible costs, however, is the breakdown in the social order that such unrest generates, an effect that endures even after the violence ceases. Citizens, particularly minority citizens, continue to mistrust the police, and their confidence in the justice system erodes. Likewise, the police become increasingly wary of the citizenry, and civil unrest may intensify already-formed racial stereotypes or generate new ones. As Loftin et al. note: “[T]he perception that police devalue the lives of some citizens may reduce citizen cooperation in reporting crime or assisting police in investigations and may generally degrade the quality of justice.”²⁵ Clearly, the unrestrained use of deadly force exacts a social cost that goes beyond body counts and monetary loss.

B. Moral Consequences of the Police Use of Deadly Force

In addition to these practical costs, there is a moral cost to the unrestrained use of deadly force that offends fundamental notions of the American constitutional order. As the Supreme Court noted in its landmark decision in *Tennessee v. Garner*,²⁶ which struck down Tennessee’s “fleeing felon” statute, “[t]he intrusiveness of a seizure by means of deadly force is unmatched.”²⁷ A seizure by way of

22. See *id.* at 7–8.

23. See Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Beating*, N.Y. TIMES, Apr. 30, 1992, at A1.

24. See GELLER & SCOTT, *supra* note 20, at 7–8; Jim Crogan, *The L.A. 53*, L.A. WEEKLY, Apr. 24, 2002, available at <http://www.laweekly.com/general/features/the-la-53/10557/> (detailing the way each of the fifty-three victims died).

25. Loftin et al., *supra* note 19, at 1117.

26. 471 U.S. 1 (1985). Under the fleeing felon statute, police officers were permitted to use deadly force in order to apprehend an individual suspected of having committed a felony. *Id.* at 4–5.

27. *Id.* at 9.

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deadly force deprives the suspect of his most fundamental right to life and, moreover, “frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.”²⁸ Despite the fact that capital punishment remains legal in the United States, it is utilized only in the most narrow of circumstances and only after the exhaustion of extensive judicial procedures, including trial, a separate sentencing determination, and subsequent appeals. By contrast, when the police use deadly force, no such process is afforded. The suspect is judged not by a jury of his peers considering all of the evidence, but rather by a police officer making a split-second decision, often under significant physiological strains.²⁹

Law enforcement advocates, like former FBI agents Urey W. Patrick and John C. Hall, have aimed to distinguish the use of deadly force from the judicial process. They argue:

The decision to use deadly force is not made to keep the peace; to detect and investigate violations of law; to identify, locate and arrest violators of the law. . . . In fact, the utilization of deadly force is of no use to fulfilling any of the well-understood law enforcement functions. It is solely a means of preempting or terminating an imminent risk of serious harm, or to prevent the escape of a dangerous individual. . . . The issue . . . is not whether deadly force was applicable to the law enforcement function—it is not.³⁰

Nevertheless, in reality it is impossible to fully distinguish the use of deadly force from the law enforcement function. A suspect who is apprehended without being subject to deadly force enjoys the full protections of the Constitution in determining his guilt or innocence, including the right to a trial by jury, the right to counsel, and the right to confront his accuser. Indeed, even those who are subject to deadly force but survive enjoy these protections. However, an officer who kills a suspect represents the state taking the life of its citizen under color of law. And when the use of deadly force is not closely monitored by the courts and the legislature, the consequences for society are both real and seriously troubling. As the Supreme Court said in *Garner*: “The use of deadly force is a self-defeating way of apprehending a suspect and so setting the

28. *Id.*

29. See UREY W. PATRICK & JOHN C. HALL, IN DEFENSE OF SELF & OTHERS. . . : ISSUES, FACTS & FALLACIES—THE REALITIES OF LAW ENFORCEMENT’S USE OF DEADLY FORCE 111–12 (2005) (discussing the various physiological strains under which officers act when engaged in deadly force encounters).

30. *Id.* at 174.

criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.”³¹ Accordingly, the police use of deadly force is a phenomenon that requires close scrutiny from the coordinate branches of government.

II. HISTORY OF DEADLY FORCE LAW

A. *Early § 1983 Developments*

Traditionally, the common law justified the police use of deadly force in two specific situations: (1) in self-defense, and (2) to apprehend a fleeing felon.³² Although the federal standards ultimately adopted closely mirror the common law, individuals were, until the latter half of the twentieth century, largely without a mechanism by which to vindicate their rights in federal court. Consequently, “[f]or most of our 200-plus year history, the States exercised their police powers unaffected by the Federal Constitution or the Federal courts.”³³

Although aggrieved citizens were entitled to pursue other mechanisms, such as state tort law or criminal law, these mechanisms have historically proved inadequate. In addition to the various litigation bars facing all state tort plaintiffs,³⁴ minority litigants in particular were subject to biases before state judges and juries that rendered redress largely elusive.³⁵ Moreover, as Jerome H. Skolnick and James J. Fyfe argue, criminal prosecutions against po-

31. *Garner*, 471 U.S. at 10.

32. See 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 179–80, 203–04 (1768); PATRICK & HALL, *supra* note 29, at 4. According to Blackstone, the common law recognized a police officer’s authority to use deadly force in the following circumstances: “(1) Where an officer, in the execution of his office . . . kills a person that assaults and resists him . . . (2) If an officer . . . attempts to take a man charged with felony, and is resisted; and in the endeavor to take him, kills him . . . (5) [I]n all these cases, there must be an apparent necessity . . . otherwise, without such absolute necessity, it is not justifiable.” BLACKSTONE, *supra*, at 179–80.

33. PATRICK & HALL, *supra* note 29, at 4.

34. See Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 247, 260–62 (William A. Geller & Hans Toch eds., 1996) (noting that state standards for vicarious liability and sovereign immunity present significant barriers for state plaintiffs suing for assault and battery or negligence).

35. See generally *Monroe v. Pape*, 365 U.S. 167, 174–75 (1961) (“The *third* aim [of § 1983] was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice The debates are replete with references to the lawless conditions existing in the South in 1871 It was not the unavailability of state remedies but the failure of certain States to enforce the

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lice officers who act excessively are rare and, when they do occur, the results are “almost invariably” disappointing.³⁶ Skolnick and Fyfe attribute these disappointing results to a phenomenon not limited to law enforcement, namely, that “professionals are better situated than lay juries to deal with the sinners among their ranks.”³⁷ In sum, there is “virtually unanimous agreement” among scholars that the criminal law is not the ideal avenue to redress or deter police excessive force.³⁸

Recognizing that state courts often failed to provide an adequate forum to redress constitutional violations, Congress in the aftermath of the Civil War passed the Civil Rights Act of 1871.³⁹ As part of the statute, Congress provided a private right of action in federal court for citizens whose constitutional rights were violated by persons acting under color of state law:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁴⁰

Despite the revolutionary nature of the statute, however, federal courts’ creative interpretation of the statute’s “under color of state law” language ensured that it was rarely invoked against the police—or anyone else for that matter—for the first 100 years of the Act’s existence.⁴¹

laws with an equal hand that furnished the powerful momentum behind [§ 1983].”).

36. SKOLNICK & FYFE, *supra* note 3, at 198.

37. *Id.* at 199.

38. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 467 (2004).

39. Codified in pertinent part at 42 U.S.C. § 1983 (2000).

40. *Id.*

41. SKOLNICK & FYFE, *supra* note 3, at 200; *see also* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1081 (5th ed. 2003); Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951) (noting that only twenty-one lawsuits were filed under § 1983 (then codified at 8 U.S.C. §§ 43, 47(3)) between 1871 and 1920). In essence, courts held that a police officer who acted outside both the Constitution and the law of the state did not act “under color of state law” as required by the statute. Meanwhile, officers who violated a plaintiff’s constitutional rights while acting in accordance with state law were per-

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The Supreme Court finally began to untangle the § 1983 straightjacket in 1961 in *Monroe v. Pape*,⁴² in which the Court rejected the argument that Chicago police officers who violated both federal and state norms were not acting “under color of state law.”⁴³ However, the Court stopped short of construing § 1983 as a mechanism for demonstrating municipal liability, holding that the word “person” in the statute did not include government entities.⁴⁴ As a result, while the frequency of § 1983 suits increased dramatically following *Monroe*,⁴⁵ the ability to obtain substantial relief remained rare.⁴⁶ Seventeen years later, the barrier to municipal liability came down in *Monell v. Department of Social Services*,⁴⁷ in which the Supreme Court held that a local government unit could be found liable for violating an individual’s constitutional rights when the violation could be shown to result from the local government unit’s official policy, practice, or custom.⁴⁸ Although unwilling to hold municipalities to the common-law standard of *respondeat superior*, under which municipalities could be liable simply for employing a tortfeasor, the Court did construe “custom” broadly to include actions carried out routinely, even if not codified as part of a written policy.⁴⁹ In addition to opening the deep pockets of government agencies to § 1983 plaintiffs, “[t]he way was now paved for direct constitutional challenges to State laws and departmental policies relating to police use of deadly force.”⁵⁰

B. Federal Constitutional Standards on the Use of Deadly Force

In § 1983 suits, the police use of deadly force is analyzed under the Fourth Amendment to the Constitution, which protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁵¹ In the

mitted to argue that they had acted in good-faith reliance on the state law, thus insulating them from liability. SKOLNICK & FYFE, *supra*, at 200.

42. 365 U.S. 167 (1961).

43. *Id.* at 184–87.

44. *Id.* at 191.

45. FALLON, JR. et al., *supra* note 41, at 1082.

46. PATRICK & HALL, *supra* note 29, at 5.

47. 436 U.S. 658 (1978).

48. *See id.* at 690–91.

49. *See id.* at 691.

50. PATRICK & HALL, *supra* note 29, at 6; *see also* SKOLNICK & FYFE, *supra* note 3, at 202 (discussing the boom in § 1983 litigation against the police following *Monell* and the drastic rise in litigation payouts by municipal entities for excessive force complaints).

51. U.S. CONST. amend. IV; *see also* *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (“[T]here can be no question that apprehension by the use of deadly force is a

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1985 case *Tennessee v. Garner*, the Court established a “reasonableness” standard for analyzing the use of deadly force, to be based on the “totality of the circumstances” of each case.⁵² The nature of this reasonableness inquiry was clarified further four years later in *Graham v. Connor*.⁵³ While reiterating that courts must consider the totality of the circumstances of each case in balancing the nature of the intrusion with the government’s interest in the intrusion, the Court added that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁵⁴ Moreover, the inquiry must account for the fact that in deciding how much force to employ, “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”⁵⁵ Ultimately, then, the reasonableness inquiry requires an evaluation of “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”⁵⁶

Assuming a seizure has taken place, an officer can generally justify the reasonableness of the use of deadly force on two bases: “(1) to protect themselves or others from immediate threats of serious physical injury; and/or, (2) to prevent escape of a person who may justifiably be characterized as ‘dangerous’ to the officers or to the community if allowed to remain at large.”⁵⁷

1. Self-Defense

The first basis—defense of self and others—is hardly surprising. As Patrick and Hall explain, “the right of self-defense is deeply grounded in the history of Anglo-American jurisprudence.”⁵⁸ The right existed at common law and was reaffirmed by the Supreme Court in 1891: “[T]he law of self-defence justifies an act done in

seizure subject to the reasonableness requirement of the Fourth Amendment.”). In *Graham v. Connor*, the Supreme Court resolved disparities among the federal courts and pronounced that “all claims that law enforcement officers have used excessive force—deadly or not . . . should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.” 490 U.S. 386, 395 (1989).

52. *Garner*, 471 U.S. at 7–9.

53. 490 U.S. 386.

54. *Id.* at 396.

55. *Id.* at 397.

56. *Id.*

57. PATRICK & HALL, *supra* note 29, at 15.

58. *Id.*

honest and reasonable belief of immediate danger.”⁵⁹ For the police, this means that so long as an officer has a reasonable belief of an immediate or imminent threat to his life, the use of deadly force will be justified under departmental policy, state law, and the Constitution. Officers are not held to a higher standard—to pursue alternative evasive actions, for instance—simply because they are invested with the authority of the state to detain and impose force upon citizens.⁶⁰ As the Fourth Circuit said in *Elliott v. Leavitt*: “The Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.”⁶¹

Courts have taken an expansive view of what threats are considered imminent. Thus, the spectrum of “immediate threats” includes not only suspects armed with a firearm,⁶² but also suspects armed with other weapons such as a knife or a club,⁶³ as well as some suspects not armed at all.⁶⁴

2. Escape Prevention

Under the traditional “fleeing felon” rule, prevalent at common law, an officer could employ any force necessary, including deadly force, to effect an arrest of a suspect who had committed a felony, but not one who had committed a mere misdemeanor.⁶⁵

59. *New Orleans & Ne. R.R. Co. v. Jopes*, 142 U.S. 18, 23 (1891).

60. PATRICK & HALL, *supra* note 29, at 25.

61. 99 F.3d 640, 641 (4th Cir. 1996) (granting summary judgment where, rather than take evasive action, two officers shot and killed a suspect who produced a handgun while handcuffed and sitting in the backseat of police vehicle and pointed it in the direction of the officers).

62. *See, e.g.*, *Napier v. Town of Windham*, 187 F.3d 177 (1st Cir. 1999); *Elliott*, 99 F.3d 640; *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995); *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992).

63. *See, e.g.*, *Wood v. City of Lakeland*, 203 F.3d 1288 (11th Cir. 2000) (boxcutter); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998) (knife); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996) (knife), *overruled on other grounds by* *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997); *Schulz v. Long*, 44 F.3d 643, 646 (8th Cir. 1995) (axe); *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 693 (1st Cir. 1994) (knife); *Plakas v. Drinski*, 19 F.3d 1143, 1144 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994) (fireplace poker).

64. Often these cases involve issues of weapon retention, where the suspect has the opportunity to gain control of the officer’s weapon with the possible intent of using it against him. *See, e.g.*, *Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997); *Salim v. Proulx*, 93 F.3d 86, 91–92 (2d Cir. 1996).

65. The apparent rationale behind this distinction lay in the fact that, at the time it was established, “virtually all felonies were punishable by death.” *Tennessee v. Garner*, 471 U.S. 1, 13 (1985). Therefore, “[t]hough effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for

The Supreme Court was asked to consider the constitutionality of the “fleeing felon rule” in the landmark 1985 case of *Tennessee v. Garner*.⁶⁶ In *Garner*, a Memphis, Tennessee, police officer, acting under the authority of both a state statute codifying the common-law rule as well as departmental policy, shot and killed fifteen-year-old suspect Edward Garner as he fled the scene of a house burglary.⁶⁷ The officer was “reasonably sure” that Garner was unarmed as he fled.⁶⁸ Garner’s father brought suit under § 1983, directly challenging the constitutionality of the shooting.⁶⁹

The Court began by noting that, at the time of the case, nineteen states had codified the fleeing felon rule by statute, while another four retained the common-law rule.⁷⁰ The State argued that because the fleeing felon rule prevailed when the Fourth Amendment was adopted, the law must stand.⁷¹ However, noting that law enforcement practices at the time of the adoption of the Fourth Amendment were not simply “frozen into [the] constitutional law,”⁷² the Court found compelling reasons why the common law’s felon-misdemeanant distinction could no longer be maintained. First, the Court noted that almost all crimes formerly punishable by death are no longer so, undermining the traditional rationale for the fleeing felon rule.⁷³ Furthermore, the distinction between felonies and misdemeanors, once “broad and deep,” has become “minor and often arbitrary,” rendering “the assumption that a ‘felon’ is more dangerous than a misdemeanor untenable.”⁷⁴ Finally, the Court noted that, in light of contemporary weaponry developments and the proliferation of handguns in law enforcement, deadly force has acquired “an altogether different

punishment of the felony of which the individual was charged or suspected.” *Id.* at 13–14. Misdemeanors, meanwhile, were considered such less dangerous crimes that permitting the use of deadly force to apprehend a fleeing misdemeanor was seen as “disproportionately severe.” *Id.* at 15.

66. 471 U.S. 1.

67. *Id.* at 3–4.

68. *Id.* at 3.

69. *Id.* at 5. Garner claimed violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. *Id.* Pursuant to *Monell*, Garner sued not only the offending officer but also the Memphis Police Department, its Director, and the Mayor and City of Memphis. *See id.* When the case reached the Supreme Court, only the city’s liability and the constitutionality of the Tennessee statute regarding fleeing felons remained at issue. *See id.* at 3, 22.

70. *Id.* at 16–17.

71. *Id.* at 13.

72. *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980)).

73. *Id.* at 14.

74. *Id.*

meaning—and harsher consequences—now than in past centuries.”⁷⁵

Given these developments, and in light of a trend away from the fleeing felon rule within police departments,⁷⁶ the Court struck down the fleeing felon rule. The Court did not, however, find the statute unconstitutional on its face. Instead, the Court shifted the focus of the analysis from the traditional felony-misdemeanor distinction to a consideration of the “dangerousness” of the suspect’s actions. Thus, the Court held: “It is not better that all felony suspects die than that they escape. When the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”⁷⁷ Conversely, “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.”⁷⁸

A “dangerous” fleeing suspect is one who “threatens the officer with a weapon or there is probable cause to believe . . . has committed a crime involving the infliction or threatened infliction of serious physical harm.”⁷⁹ In addition to this “dangerousness” prong, *Garner* further held that deadly force may only be used “if necessary to prevent escape, and if, where feasible, some warning has been given.”⁸⁰ The “necessity” prong ensures that when an officer can prevent escape and detain the suspect without resorting to the use of deadly force or endangering himself or others, he must do so. After *Graham v. Connor*, this inquiry must be “judged from the perspective of the reasonable officer on the scene.”⁸¹

C. Contemporary Considerations—Deadly Force Policies

As Geller and Scott explain, *Garner* is considered a landmark in that it “for the first time . . . established a *national* minimum stan-

75. *Id.* at 15.

76. The Court gave significant weight to the fact that police department policies were overwhelmingly more restrictive than the common-law rule, pointing out that only 7.5% of departmental and municipal policies explicitly permitted the use of deadly force against any felon at the time; 86.8% explicitly did not. *Id.* at 18–19. This indicated to the Court that declaring the long-standing practice unconstitutional would not significantly hamper effective law enforcement. *Id.* at 19.

77. *Id.* at 11.

78. *Id.*

79. *Id.*

80. *Id.* at 11–12.

81. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

dard governing police use of deadly force.”⁸² In the wake of *Garner*, “a substantial number of police agencies across the nation were required by this ruling to change their policies and practices.”⁸³ In addition, *Garner* had a “confirming power . . . bolstering the direction of deadly force policy and practice reform in most jurisdictions in the nation.”⁸⁴ Today, “[a]s a rule, many, if not most, choose to limit *by policy* the permissible use of deadly force to a point inside the outer bounds defined by the U.S. Supreme Court rather than reach to the very outer limits constitutionally allowed.”⁸⁵ In addition to limiting the number of viable lawsuits, evidence from many cities indicates that adopting a deadly force policy more restrictive than the constitutional standard tends to decrease the incidence of the use of deadly force.⁸⁶

III. PHILADELPHIA AND THE POLICE USE OF DEADLY FORCE

As this Note aims to incorporate and account for many of the findings of the recent report filed by Philadelphia’s Integrity and Accountability Office on Officer-Involved Shootings, it is helpful to briefly take note of Philadelphia’s unique history with the police use of deadly force.

A. Deadly Force Studies in Philadelphia

The Philadelphia Police Department (“PPD”) was officially established in 1850.⁸⁷ Today the PPD is made up of about 6600 officers⁸⁸ in a city of about 1.5 million residents, the sixth most

82. GELLER & SCOTT, *supra* note 20, at 256.

83. *Id.*

84. *Id.*

85. PATRICK & HALL, *supra* note 29, at 47.

86. See Fyfe, *supra* note 9, at 184; Elsa Walsh, *Miami Blue: The Testing of a Top Cop*, NEW YORKER, Mar. 5, 2007, at 46; see generally GELLER & SCOTT, *supra* note 20, at 257–67 (discussing the effects of policy changes in several different police departments around the United States).

87. Phil Bowdren, A Brief History of the Philadelphia Police Department, http://www.ppdonline.org/hq_history.php (last visited Aug. 12, 2008).

88. *Id.*

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populous city in the United States.⁸⁹ The PPD reached its peak enrollment of 8500 officers in 1979.⁹⁰

Despite an overall paucity of data on police use of deadly force until the 1980s, much of the valuable information gleaned came from Philadelphia. The first empirical study of police deadly force was undertaken by Gerald Robin, who set out to analyze all fatal shootings by Philadelphia police between 1950 and 1960.⁹¹ Robin discovered that police officers shot and killed thirty-two suspects over this eleven-year period, or just under three per year.⁹² While extensive records were kept for each case, in thirty of the thirty-two cases the officers involved were exonerated by the medical examiner's determination that death had resulted from justifiable homicide.⁹³ The two remaining cases resulted in criminal charges, and in both the officers were acquitted by a jury.⁹⁴ In comparison with nine other cities, all with populations greater than 250,000, Philadelphia's annual rate of justifiable homicide—0.61 decedents per 1000 officers—ranked in the middle of the pack.⁹⁵

James J. Fyfe subsequently conducted a comprehensive study of the PPD's use of deadly force in the 1970s and early 1980s, a period during which the City was dominated by its hard-line Police Commissioner and Mayor, Frank L. Rizzo. A member of the Philadelphia Police Department since the 1940s, Rizzo rose to the rank of Commissioner in 1967 and quickly began shaping the police force, and the city, in his image. He was elected Mayor in 1971, and throughout his eight-year tenure until 1979 he ran the city's law enforcement with a controversial but unapologetic disdain for

89. U.S. Census, Annual Estimates of the Population for Incorporated Places over 100,000 Ranked by July 1, 2005 Population: April 1, 2000 to April 1, 2005, <http://www.census.gov/popest/cities/tables/SUB-EST2005-01.xls> (last visited Aug. 12, 2008). 2006 census data will confirm that Philadelphia, formerly the fifth most populous city, has been surpassed by Phoenix, according to media reports. See, e.g., Julie Shaw, *Philly Drops to 6th-largest U.S. City*, PHILA. DAILY NEWS, Mar. 22, 2007, at A1.

90. THE COMMITTEE OF SEVENTY, PHILADELPHIA POLICE DEPARTMENT GOVERNANCE STUDY 5 (1998), available at http://www.seventy.org/Downloads/Policy_&_Reform/Governance_Studies/1998_Police_Governance_Study.pdf.

91. Gerald D. Robin, *Justifiable Homicide by Police Officers*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 225, 226 (1963).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 229–30 (Robin categorizes the rates of justifiable police homicide per 10,000 officers. I have converted the figure to “per 1000” to correspond with Fyfe's 1988 study).

criminals.⁹⁶ Rizzo once told a reporter at a news conference, “I’m so tough I’m gonna make Attila the Hun look like a faggot,”⁹⁷ and he similarly boasted that he had armed the police department well enough “to invade Cuba and win.”⁹⁸

Rizzo’s bravado had a dramatic effect on both the frequency of and accountability for police use of deadly force. In 1973, after the state legislature acted to restrain the use of deadly force against certain suspects, the PPD, at Rizzo’s urging, abolished its restrictive deadly force policy.⁹⁹ As Fyfe concedes, during this period “[the] PPD adopted an operating style in which police were effectively free to do anything with their guns, as long as they did not use them to resolve their own personal disputes.”¹⁰⁰

Fyfe’s data supports his conclusions. The PPD homicide rate per 1000 officers, having already doubled in the time since Robin’s study, doubled again—from 1.47 to 2.87—in the first year following the abolition of the deadly force policy.¹⁰¹ The rate per 1000 officers generally hovered between 2.5 and 3.5 for most of the decade.¹⁰² The rate temporarily declined in 1976 in response to a federal court injunction but doubled immediately after the injunction was lifted.¹⁰³ During this period, according to Skolnick and Fyfe, Philadelphia police officers were “*thirty-seven times* as likely as New York cops to shoot unarmed people who had threatened nobody and who were fleeing from suspected nonviolent crimes.”¹⁰⁴ From 1972 to 1979, the department averaged 18.6 police-inflicted fatalities a year.¹⁰⁵

Furthermore, while many, if not most, of these shootings violated Pennsylvania criminal law, Fyfe, after reviewing PPD reports of shootings resulting in injury or death from 1970 to 1978, found that the department rarely disciplined its officers.¹⁰⁶ Emblematic of this tolerant attitude is Rizzo’s statement to a reporter after refusing to initiate an investigation into one such fatal shooting: “My men are

96. See SKOLNICK & FYFE, *supra* note 3, at 139–40.

97. Andrea Mitchell, *Me and Frank*, PHILA. WEEKLY, Sept. 7, 2005, at 18, available at <http://www.philadelphiaweekly.com/view.php?id=10398>; see also SKOLNICK & FYFE, *supra* note 3, at 139.

98. SKOLNICK & FYFE, *supra* note 3, at 139.

99. Fyfe, *supra* note 9, at 182.

100. *Id.*

101. *Id.*

102. *Id.* at 182–84.

103. *Id.*

104. SKOLNICK & FYFE, *supra* note 3, at 140.

105. Fyfe, *supra* note 9, at 183 fig.1.

106. *Id.* at 182 n.20.

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right when they're right, and they're right when they're wrong and they're trying to be right."¹⁰⁷ In his study, Fyfe found only *two* instances in which police officers faced any kind of discipline for their actions: in one case the officer had shot and killed his wife; in the other the officer had fired unnecessarily in the air and was suspended for two days.¹⁰⁸ Most officers who fired at suspects were found to have acted within the unwritten and undefined departmental policies implemented following the abolition of the written policy in 1973.¹⁰⁹

After Rizzo left office in 1980, the department adopted a new deadly force policy that corresponded closely with the state statute.¹¹⁰ The police homicide rate immediately declined sixty-seven percent to a rate of 0.80 and remained relatively low in the years thereafter.¹¹¹ Based on this data, Fyfe concludes that internal organizational variables such as policies and high-ranking personnel within a police department account for much of the variation in police homicide rates.¹¹² In short, Fyfe states that "Frank Rizzo was *the* critical variable in all Philadelphia police issues during the years in question."¹¹³

B. *Police Misconduct Litigation in Philadelphia*

Aside from being the subject of scholarly analysis on the police use of deadly force, Philadelphia has also served as the setting for ground-breaking litigation aimed at curbing police misconduct. First, in *Rizzo v. Goode*,¹¹⁴ individuals and civil rights groups in 1970 initiated a class action under § 1983 against the Mayor of Philadelphia, then-Commissioner Rizzo, and other city officials, alleging a pattern of illegal and unconstitutional police mistreatment of minority citizens throughout the city.¹¹⁵ The plaintiffs sought broad equitable relief for the pattern of violations, many of which in-

107. Mitchell, *supra* note 97.

108. Fyfe, *supra* note 9, at 182 n.22.

109. SKOLNICK & FYFE, *supra* note 3, at 141.

110. Fyfe, *supra* note 9, at 184. The policy authorized officers "to shoot in defense of life and, when no alternative exists, to apprehend fleeing suspects who officers know are in possession of deadly weapons that they have used or threatened to use, or who have committed forcible felonies." *Id.* The policy remains largely intact today as Directive 10. See IAO REPORT, *supra* note 14, at 37 (describing PPD Directive 10).

111. Fyfe, *supra* note 9, at 184.

112. *Id.* at 181–85.

113. *Id.* at 185.

114. 423 U.S. 362 (1976).

115. *Id.* at 364 n.1, 366, 370.

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volved excessive force, and, in 1973, the district court granted such relief, requiring the City to submit to the court a “comprehensive program for improving the handling of citizen complaints alleging police misconduct.”¹¹⁶ The resulting injunction is alluded to by Fyfe as one of the main reasons for a sudden, sharp decline in police shootings in 1976.¹¹⁷

However, the Supreme Court reversed the district court in 1976, on two primary grounds. First, the Court held that the plaintiffs’ claim to “real and immediate” injury—required to maintain an Article III case or controversy—rested “not upon what the named petitioners might do to them in the future . . . but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman’s perception of departmental disciplinary procedures.”¹¹⁸ The Court thus held that the plaintiffs lacked the requisite personal stake in the outcome to require “overhauling police disciplinary procedures.”¹¹⁹ Second, the Court held that the district court’s injunction represented an unwarranted intrusion into the defendants’ discretionary authority to perform their official functions.¹²⁰ In essence, the Court held that it was unfair to hold city officials responsible for the actions of a few abusive police officers, none of whom were parties to the suit. The case represents a significant defeat for citizens’ ability to obtain injunctive relief under § 1983.¹²¹

After the Court’s decision in *Rizzo*, the federal government tried to involve itself in the plight of Philadelphia’s minorities. In 1979, the United States, through the Department of Justice, initiated a suit against the City seeking injunctive relief to prevent “a pattern or practice of depriving persons of rights protected by the due process clause of the [F]ourteenth [A]mendment.”¹²² The government’s argument in *United States v. City of Philadelphia* was split into two parts: First, it alleged that PPD officers “engaged in a widespread practice of violating the rights of persons they encounter in the streets,” including “unnecessary use of deadly force, such as shooting criminal suspects who offer no realistic threat to the safety of the police officers or other persons.”¹²³ Second, the gov-

116. Council of Orgs. on Phila. Police Accountability and Responsibility v. *Rizzo*, 357 F. Supp. 1289, 1322 (E.D. Pa. 1973).

117. Fyfe, *supra* note 9, at 182.

118. *Goode*, 423 U.S. at 372.

119. *Id.* at 372–73.

120. *Id.* at 380.

121. Cheh, *supra* note 34, at 266.

122. *United States v. City of Philadelphia*, 644 F.2d 187, 190 (3d Cir. 1980).

123. *Id.*

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ernment alleged that the City and its leaders had “deliberately encouraged these illegal practices through the policies and procedures they have established for investigating complaints of illegal police activity.”¹²⁴

The Third Circuit, however, held that neither the Civil Rights Acts nor the Fourteenth Amendment provided the federal government with an implied right of action alleging an illegal pattern or practice.¹²⁵ Rather, it held that specific statutory authority is required.¹²⁶ Accordingly, the suit was dismissed. Finally, in 1994, Congress enacted a statute endowing the Department of Justice (“DOJ”) with this authority.¹²⁷ Such suits have since been implemented against numerous cities, often resulting in consent decrees.¹²⁸

C. Philadelphia’s Deadly Force Developments: 1980s–1990s

While the City generally avoided any significant sanction as a result of these lawsuits, the institution of a comprehensive deadly force policy in 1980 drastically reduced the frequency of police homicides for much of the 1980s. However, in perhaps the most dramatic application of the use of deadly force in United States law enforcement history, Mayor Wilson Goode ordered the police to drop a bomb on a house in West Philadelphia on May 13, 1985 in an effort to end a standoff with members of the radical MOVE organization.¹²⁹ The bomb ignited a fire that destroyed an entire city block, killing eleven people, including five children, and leaving another 250 homeless.¹³⁰ The incident was at the time and remains perhaps today the most embarrassing episode in Philadelphia’s long history.¹³¹ The City has incurred judgments and settled suits totaling \$27.3 million as a result of the incident, including \$2.5 million to MOVE itself for the deaths of five children.¹³²

Despite the shame of the MOVE bombing, Philadelphia nevertheless maintained a low rate of police-inflicted civilian fatalities through the second half of the 1980s. According to Geller and

124. *Id.*

125. *See id.* at 201.

126. *Id.*

127. 42 U.S.C. § 14141 (2000); *see also* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 815 (1999).

128. *See infra* notes 301–06 and accompanying text.

129. *See* Eichel, *supra* note 18.

130. *See id.*; GELLER & SCOTT, *supra* note 20, at 380.

131. *See* Eichel, *supra* note 18.

132. *See* GELLER & SCOTT, *supra* note 20, at 380.

Scott, fatal shootings by police fluctuated between about five and ten per year throughout the decade, with an average of about seven per year.¹³³ That rate declined even further in the late 1990s under the Commissionship of John Timoney.¹³⁴ Timoney was appointed Commissioner of the PPD in 1998,¹³⁵ having served for nearly thirty years in the NYPD alongside the likes of Ray Kelly and William Bratton, the two men credited with authoring the dramatic crime reductions in New York City in the 1990s.¹³⁶ In the 1980s, Timoney studied the effect of New York City's reforms on the police use of weapons, discovering that the simple adoption of a written policy in 1972 had led to a dramatic decrease in police shootings.¹³⁷

Applying the lessons he learned in New York to the PPD, Timoney brought about dramatic changes in Philadelphia. In addition to restoring legitimacy to and confidence in the department following a corruption scandal, he brought the number of homicides in the city below 300, where the number had been at over 400 annually for almost a decade.¹³⁸ Police use of deadly force declined as well, with an average of about five police-inflicted fatalities per year during his tenure, including a low of just *two* in 2001, his final year on the job.¹³⁹

D. Philadelphia in the 21st Century: Troubling Trends

Much as Frank Rizzo's departure led to a precipitous drop in the police use of deadly force, Timoney's departure has had an opposite effect. Under Commissioner Sylvester Johnson, police-inflicted fatalities have increased steadily and dramatically in the past five years, with an average of *thirteen* per year.¹⁴⁰ In 2006, levels of police violence in Philadelphia returned to levels not seen since the Rizzo era, before a comprehensive deadly force policy even existed. In 2006, there were *twenty* fatal shootings by Philadelphia police, a tenfold increase from 2001, and more than any of the nation's ten largest cities.¹⁴¹ Philadelphia even outranked New York City, which had just thirteen police-inflicted civilian fatalities in 2006, despite a population and police force nearly six times the size of Philadel-

133. *Id.* at 66; *see also* Moran, *supra* note 9.

134. *See* Walsh, *supra* note 86.

135. *Id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. IAO REPORT, *supra* note 14, at 15.

140. *See id.* at 14; Moran, *supra* note 9.

141. *See* Moran, *supra* note 9.

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phia's.¹⁴² Although 2007 saw a slight decline, the total of fifteen police-inflicted fatalities still far exceeded the average totals of the late 1990s.¹⁴³

Police officials attribute the drastic rise to a “more violent street culture” and are quick to point out that the increase in police shootings corresponds with the general rise in violent crime in recent years.¹⁴⁴ In 2006, the city topped 400 homicides for the first time in a decade, with a total of 406.¹⁴⁵ A slight decline in 2007 did not stop observers from taking notice, calling Philadelphia “the most murder-plagued big city in the country,” with a murder rate three times the national average.¹⁴⁶ At the close of the year, a *Philadelphia Daily News* headline screamed, “Call it Killadelphia?”¹⁴⁷ City Hall’s response has been to lash out at critics in the media while trumpeting overall drops in crime and increases in arrests.¹⁴⁸ Commissioner Johnson has also pointed to similar increases in gun violence in a range of cities.¹⁴⁹

It is certainly reasonable to expect that in an increasingly violent environment, an officer is more likely to find his or herself in a situation where his or her life is in danger; nonetheless, the City’s response largely ignores the specific question of why Philadelphia police are more likely to shoot at suspects than every other police force in the country. Rather, the City’s explanation seems to echo Rizzo in implying that the appropriate way to combat street violence is through unrestrained police violence. However, there is no evidence to indicate that unleashing the police to use deadly force

142. *Id.*

143. Phillips et al., *supra* note 9.

144. Moran, *supra* note 9; *see also* Sylvester Johnson, *The Commissioner Speaks*, PHILA. MAG., Feb. 2007, at 26. This argument reflects the prediction by some scholars and officials, including Los Angeles Police Chief William Bratton, that the 1990s nationwide crime decline is on the verge of giving way to a “gathering storm” crime wave. *See* POLICE EXECUTIVE RESEARCH FORUM, A GATHERING STORM—VIOLENT CRIME IN AMERICA 2 (2006), http://www.policeforum.org/upload/GatheringStorm-PRINT-Final_110473745_1027200610304.pdf.

145. *See* Todd Mason, *4 Slayings Push City Death Toll to 400*, PHILA. INQUIRER, Dec. 25, 2006, at A1; Moran, *supra* note 9.

146. David Gambacorta, *Brotherly Love? It’s Murder City*, PHILA. DAILY NEWS, Feb. 28, 2007, at 7; *see also* Dave Davies, *This Bleeding City: Call it ‘Killadelphia?’*, PHILA. DAILY NEWS, Dec. 31, 2007, at 3 (noting that the number of murders dropped to 391 in 2007, but that the city maintained the highest murder rate among the nation’s ten largest cities).

147. Davies, *supra* note 146.

148. *See* Johnson, *supra* note 144; Monica Yant Kinney, *Fear in City Contradicts Johnson’s Crime Cop-outs*, PHILA. INQUIRER, Jan. 6, 2008, at B1.

149. *See* Johnson, *supra* note 144.

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has an effect on crime rates.¹⁵⁰ Moreover, even were this the case, such a fact could not justify disregard of departmental policies and constitutional norms governing the use of deadly force.

Regardless, the current climate of violence in Philadelphia undeniably grips the city; the crime problem and how to solve it dominated the highly competitive Democratic Mayoral primary in 2007.¹⁵¹ One candidate even pledged to bring back Timoney,¹⁵² who, since leaving Philadelphia, has authored a similar turnaround as police commissioner in Miami.¹⁵³ The eventual winner, Michael Nutter, signed an executive order declaring a crime emergency on his first day in office.¹⁵⁴

In 2005, the city's Integrity and Accountability Office ("IAO"), an independent monitor and auditor of departmental policies and practices, published a comprehensive report analyzing the recent rise in police shootings.¹⁵⁵ While finding that the majority of police shootings in the city between 1998 and 2003 were "reasonable," the report nonetheless called the increase under Johnson a "troubling trend that warrants close attention and monitoring."¹⁵⁶ The report also found numerous deficiencies in the training of officers, the investigation of shooting incidents, and the department's commitment to discipline of officers involved in shooting incidents.

The City's response, however, was one of indifference and disdain. Commissioner Johnson has in the past dismissed IAO reports as "wrong" and "disgraceful" while characterizing them as "attacking" the police department.¹⁵⁷ After publishing the latest report on police shootings, the IAO's director, Ellen Green-Ceisler, stepped

150. See, e.g., Paul G. Chevigny, Commentary, *Police Violence: Causes and Cures*, *Edward V. Sparer Public Interest Law Fellowship Forum, Brooklyn Law School*, April 15 1998, 7 J.L. & POL'Y 85, 86 (1998) (arguing against the folk assumption that a reduction in the use of deadly force results in higher crime rates).

151. FRANKLIN & MARSHALL CTR. FOR OPINION RESEARCH, JANUARY 2007 KEYSTONE POLL—PHILADELPHIA MAYORAL, MARGINAL FREQUENCY REPORT 1 (Jan. 2007) (demonstrating that crime, drugs, and violence represented the number one issue for voters) (on file with *The New York University Annual Survey of American Law*).

152. Robert Moran, *Evans Stresses Policing in Talk with Black Clergy*, PHILA. INQUIRER, Feb. 9, 2007, at B9.

153. Walsh, *supra* note 86. In Timoney's four years in Miami, police have shot at just seven people, killing only two. *Id.*

154. Patrick Kerkstra & Marcia Gelbart, *'This Is Our City and We're Taking It Back'; Newly Inaugurated Mayor Lays Out Dramatic Goals*, PHILA. INQUIRER, Jan. 8, 2008, at A1.

155. See generally IAO REPORT, *supra* note 14.

156. *Id.* at 8, 14.

157. Gwen Shaffer, *Arrested Development*, PHILA. WKLY., June 8, 2005, at 25, available at <http://www.philadelphiaweekly.com/view.php?id=9643>.

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down to seek a judgeship.¹⁵⁸ The position has not since been filled, and the future of the IAO is in serious doubt.¹⁵⁹

As this Note continues to study the limitations of the courts in overseeing the police use of deadly force, Philadelphia's roller-coaster experience with the police use of deadly force from the 1970s to the present day serves to demonstrate the important, even determinative impact that quality of police management can have on both crime rates and the frequency of police use of deadly force. Although federal standards and departmental policy have remained relatively stable since the 1980s, the frequency of crime and the nature of law enforcement's response continued to fluctuate wildly as Timoney's commissionership gave way to that of Johnson's. However, while one might expect that § 1983 suits provide a mechanism by which the federal judiciary can continuously monitor the police use of deadly force, the following Part contends that this is not necessarily the case.

IV. THE LIMITATIONS ON JUDICIAL OVERSIGHT IN § 1983 ACTIONS

In *Garner*, the Supreme Court called the police use of deadly force "a self-defeating way of apprehending a suspect,"¹⁶⁰ and affirmatively established the federal judiciary as the proper body for delineating the constitutional contours of the practice.¹⁶¹ However, a closer look at three specific doctrinal aspects of § 1983 deadly force litigation demonstrates the limitations on judicial oversight of the practice. Moreover, each aspect is characterized by worrisome features of contemporary police culture that further constrain the judiciary's ability to affect police behavior, raising the risk that deadly force will be wielded without serious scrutiny. Unless the courts are able to overcome these limits, it largely falls on police management to ensure compliance with the constitutional standards.

The aspects of § 1983 litigation that this Part examines are (*a*) the dramatic evidentiary disparity that typically characterizes the

158. *See id.*; Monica Yant Kinney, Editorial, *A Painful Truth Won't Be Denied*, PHILA. INQUIRER, Mar. 13, 2007, at B1; Tom Namako, *Who's Watching the Watchers?*, PHILA. CITY PAPER, Jan. 10, 2008, available at <http://www.citypaper.net/articles/2008/01/10/whos-watching-the-watchers>.

159. *See* Namako, *supra* note 158; Editorial, *Who Polices the Police?*, PHILA. DAILY NEWS, Jan. 17, 2007, at 19.

160. *Tennessee v. Garner*, 471 U.S. 1, 10 (1985).

161. *See id.* at 11–12.

§ 1983 inquiry under *Garner* and *Graham*; (b) the temporal focus in many circuits on the moment of decision to shoot in assessing an officer's reasonableness, as opposed to also analyzing pre-seizure conduct which may exacerbate the necessity to employ deadly force; and (c) a punitive focus on individual officers that prevents the federal courts from significantly influencing law enforcement's attitude towards the use of deadly force.

A. *Factual Asymmetry in the § 1983 Inquiry*

1. Evidentiary Asymmetry as a Constraint on the Fact Finder

Tennessee v. Garner established that courts evaluating § 1983 suits alleging an unreasonable use of deadly force are required to ask "whether the totality of the circumstances justified" the use of deadly force in order to effect the seizure.¹⁶² Four years later, in *Graham*, the Court further intimated that a proper application of the reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."¹⁶³ In conducting this evaluation, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."¹⁶⁴

Clearly, then, the facts and circumstances surrounding a given encounter between the police and a suspect will be crucial in determining liability under § 1983. Although officers are forced to make split-second judgments, the actions and counter-actions that occur in those few seconds—whether the suspect displayed a weapon or motioned to retrieve one from his waistband, whether the suspect took off down an alleyway and whether the officer pursued him, whether the preceding crime was merely speeding or armed robbery, for instance—can constitute the difference between life and death, and can determine whether the decision to use deadly force is reasonable or unreasonable.

However, that § 1983 suits are often dependent on the factual account of what occurred between the suspect and the officer is particularly complicated in deadly force encounters and presents a unique challenge to reviewing courts. Specifically, when deadly force is employed successfully—that is, when the suspect is killed—

162. *Id.* at 8–9.

163. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

164. *Id.*

there will necessarily be a dramatic asymmetry in the information and perspective available to the fact finder that favors the police. This asymmetry is aggravated when a police department is lax in its commitment to gathering information from witnesses and participants in shooting incidents, as the IAO Report concludes is the case in Philadelphia.¹⁶⁵ Finally, contemporary police culture phenomena such as the “Code of Silence” and “testilying” confirm that the law enforcement perspective that *is* available to fact finders when officers employ deadly force may be seriously tainted.¹⁶⁶

The first issue, the asymmetry of available information, is fairly easy to understand. When an officer uses deadly force to kill a suspect and there are no witnesses, only the officer’s account will be available for evaluation by a fact finder. In theory, a defendant officer who recounts through testimony that his use of deadly force was reasonable will be entitled to summary judgment *on every occasion*; though there may be another side to the story, when the officer’s account is undisputed in court, there is no genuine issue of material fact, which is necessary in order to proceed to trial. Recognizing this as a concern for the decedent’s survivors, some courts have attempted to undertake a more searching inquiry when the officer’s account is the sole account of the circumstances surrounding an incident. For instance, in *Plakas v. Drinski*, the Seventh Circuit said:

The award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify. In any self-defense case, a defendant knows that the only person likely to contradict him or her is beyond reach. So a court must undertake a fairly critical assessment of the forensic evidence, the officer’s original reports or statements and the opinions of experts to decide whether the officer’s testimony could reasonably be rejected at a trial.¹⁶⁷

Similarly, the Ninth Circuit has said:

[T]he court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer’s story, and consider whether this evidence could

165. See IAO REPORT, *supra* note 14, at 41–46.

166. See *infra* notes 179–191 and accompanying text.

167. 19 F.3d 1143, 1147 (7th Cir. 1994), *cert. denied*, 513 U.S. 820 (1994).

convince a rational factfinder that the officer acted unreasonably.¹⁶⁸

A simple example illustrates the problem quite clearly. Suppose an officer fires upon and kills an unarmed suspect, despite the fact that he saw no sign that the suspect was carrying a weapon. Facing the likelihood that such a shooting will be deemed unreasonable by a fact finder, the officer has a clear incentive to lie, to manipulate the facts in order to cast his actions in a more “reasonable” light. Simply by testifying that the officer saw the suspect reach for his waistband for what he thought was a weapon, the officer can establish the reasonable fear of an imminent threat that, after the fact, justifies his decision to shoot. Courts faced with such a scenario are well served to undertake the kind of searching inquiry envisioned by the Seventh Circuit in *Plakas* in an attempt to overcome these limitations. Still, however, the concern does not disappear.

The perverse incentive to lie or hide facts leads directly to the second and third set of concerns. One of the chief worries expressed in the Philadelphia IAO Report involved the manner and quality of police-involved shooting investigations, particularly with regard to witness interviews.¹⁶⁹ As the Report notes:

The [Shooting Investigations Unit (“SIU”)] relies heavily on the statements of officers and witnesses in determining whether shootings were both legal and in compliance with Departmental policies. It is therefore essential that all police and civilian interviews be thorough and objective; that they elicit relevant details and explore important issues; and that they thoroughly explore contradictions, inconsistencies, and implausible answers.¹⁷⁰

Unfortunately, after investigating hundreds of officer and witness interviews conducted as part of SIU investigations, the IAO found notable deficiencies in the quality of these interviews. For instance, many of the interviews consisted of twelve to eighteen virtually identical questions, with rare deviations from this “script, re-

168. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995); *see also* *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 492 (5th Cir. 2001); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1169 (9th Cir. 1996). This principle has been applied in some district courts. *See* *James v. Harris County*, No. H-04-3576, 2006 U.S. Dist. LEXIS 70307, at *19 (S.D. Tex. Sept. 28, 2006); *Kalimah v. City of McKinney*, 213 F. Supp. 2d 698, 703 (E.D. Tex. 2002).

169. *See* IAO REPORT, *supra* note 14, at 41–46.

170. *Id.* at 42–43.

ardless of the complexity of the shooting incident.”¹⁷¹ Moreover, in some instances, investigators asked “improper, leading questions, raising doubts about the investigator’s objectivity.”¹⁷² In short, the Report did not find that the interviews were flexible or responsive to the unique circumstances of each incident.¹⁷³ As the facts recounted by witnesses may constitute the only counterweight to the officer’s testimony, it is imperative to the integrity of the case that these investigations are carried out thoroughly and properly, with the paramount goal of discovering the truth.

Another issue noted in the IAO Report concerns the recording of witness interviews. While departmental policy requires that the statement of an officer subject to an investigation be recorded verbatim, other officer and witness interviews are simply handwritten, typed, and even paraphrased or summarized by the investigator.¹⁷⁴ The Report forcefully recommends that the PPD require that “all police witnesses submit to audio and/or video taped interviews, as should all civilian witnesses whenever possible.”¹⁷⁵ The Report notes that electronically recorded witness interviews are regarded as more reliable, useful, and compelling, and that the PPD is “one of the last major law enforcement agencies in the nation that does not audio-tape or video-tape the interviews of witnesses and officers.”¹⁷⁶

The value and benefit of recording police interviews is widely recognized by scholars as well. Writing in the context of juvenile interrogations, Barry C. Feld notes:

For the past decade, virtually every legal analyst, criminologist, social psychologist, and policy group has advocated audio recording or videotaping . . . to make the process more visible and transparent. . . . It creates an objective record that all parties—police, prosecutors and defense lawyers, judges and juries—can review and thereby increases the transparency of the . . . process and the accuracy of the ensuing evidence. Recording also increases the reliability of the statements obtained [and] avoids the credibility disputes that inhere in “swearing contests” between police and defendants¹⁷⁷

171. *Id.* at 43.

172. *Id.*

173. *Id.* at 43–44.

174. *Id.* at 45.

175. *Id.* at 48.

176. *Id.* at 46.

177. Barry C. Feld, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 92–93 (2006).

Needless to say, a court tasked with determining whether, based on the totality of the circumstances, an officer's actions were reasonable benefits from the most accurate, transparent, and reliable source imaginable. Undoubtedly, then, the system is better served when witness interviews and statements are recorded. Finally, as the IAO Report points out, mandating electronic recording also benefits the City, as such a requirement saves the City "time, money, and energy in . . . defend[ing] itself from allegations of coercion, or other allegations of police misconduct."¹⁷⁸ When departments fail to insist on such measures, the courts' ability to exercise meaningful oversight in deadly force cases is diminished.

2. Evidentiary Asymmetry in Police Culture: The Blue Code of Silence and Testilying

Of course, the fact-asymmetry issue would not constitute such a concern if law enforcement officers could be expected to honestly report the facts of encounters with suspects, even if it means incriminating themselves or, more realistically, incriminating their colleagues. Unfortunately, as numerous scholars have demonstrated—and police officials have conceded—this is hardly the case.¹⁷⁹ In reality, contemporary police culture often *demand*s that officers lie or conceal the truth in order to protect their own. As Skolnick observes, the police "Blue Code of Silence" is an "embedded feature of police culture" that commands loyalty and brotherhood among officers in a way that tends to "sustain an oppositional criminal subculture protecting the interests of police who violate the criminal law."¹⁸⁰

These notions of loyalty and brotherhood that form the foundation of the Code are "first established in [p]olice [a]cademies and . . . reinforced throughout officers' careers."¹⁸¹ More than an urban legend, the "Code of Silence" has been acknowledged repeatedly in major investigations of police corruption, most notably by the Knapp (1973) and Mollen (1994) Commissions in New York City and the Christopher Commission in Los Angeles (1991).¹⁸² All three investigations "singled out the Code as an obstruction to their

178. IAO REPORT, *supra* note 14, at 45–46.

179. See *infra* notes 186–92 and accompanying text.

180. Jerome H. Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRAC. AND RES. 7, 7 (2002).

181. *Id.* at 8.

182. See THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 4 (1973); COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF N.Y., COMMISSION REPORT 51 (1994) [hereinafter MOLLEN COMMISSION]; INDEP. COMM'N ON THE L.A. POLICE

inquiry into police corruption or excessive force.”¹⁸³ Specifically, the Christopher Commission called the Code “[p]erhaps the greatest single barrier to the effective investigation and adjudication of complaints.”¹⁸⁴

While, at bottom, the Code of Silence refers to “the unwritten rule that an officer never incriminates a fellow officer,” the Code manifests itself in a variety of ways.¹⁸⁵ In addition to the failure and refusal to report instances of police misconduct, the Code also ensures that officers under investigation for misconduct “can count on police witnesses to the misconduct to back up any story they tell irrespective of the truthfulness of the story.”¹⁸⁶ In perhaps the most familiar example of this phenomenon, four LAPD officers were able to beat Rodney King with impunity despite the presence of a dozen other officers on the scene because they “must have believed that they could count on their colleagues to lie in a case of investigation.”¹⁸⁷

Nor is such lying limited to investigations; the Code also mandates “providing false testimony—‘falsifications’—to cover up or support the misdeeds of fellow police officers.”¹⁸⁸ In 1994, Alan Dershowitz publicized the phenomenon of “testilying,” the widespread practice of law enforcement officers lying under oath, a practice that “has long been an open secret among prosecutors, defense lawyers and judges.”¹⁸⁹ While condemning the practice generally, Dershowitz focused much of his ire on judges who “pretend[] to believe the tallest tales told by lying cops in the face

DEP’T, REPORT OF THE INDEPENDENT COMMISSION 168 (1991) [hereinafter CHRISTOPHER COMMISSION].

183. Skolnick, *supra* note 180, at 7; *see also* Tim Weiner, *Ex-Officer Who Broke Code of Silence Given Probation*, PHILA. INQUIRER, Feb. 13, 1985, at A1 (quoting U.S. Attorney Edward S.G. Dennis Jr.: “[T]here is a custom that has developed within the Philadelphia Police Department that Philadelphia police officers will acquiesce in the illegal and improper conduct of their fellow officers, and that when called to tell the truth . . . the Philadelphia police officer will remain silent.”). Courts have also recognized the code of silence. *See, e.g.*, Sorlucco v. New York City Police Dep’t, 971 F.2d 864, 872 (2d Cir. 1992); Spell v. McDaniel, 824 F.2d 1380, 1393 (4th Cir. 1987); United States v. Ambrose, 740 F.2d 505, 521 (7th Cir. 1984); Thomas v. City of New Orleans, 687 F.2d 80, 83 (5th Cir. 1982).

184. CHRISTOPHER COMMISSION, *supra* note 182, at 168.

185. MOLLEN COMMISSION, *supra* note 182, at 51; *see also* CHRISTOPHER COMMISSION, *supra* note 182, at 168.

186. Skolnick, *supra* note 180, at 8.

187. Jerome H. Skolnick, *It’s Not Just a Few Rotten Apples: The Beating of Rodney King Reignites Los Angeles’ Debate on Police Conduct*, L.A. TIMES, Mar. 7, 1991, at B7.

188. Skolnick, *supra* note 180, at 8.

189. Alan M. Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17.

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of overwhelming evidence of pervasive perjury.”¹⁹⁰ Although numerous police organizations criticized Dershowitz’s portrayal as grossly exaggerated, a year later, William Bratton, NYPD Commissioner at the time, conceded that testilying is “enough of a problem that we need to address it.”¹⁹¹

Acknowledging, as many have, that officers are willing to commit perjury in order to put a suspect in jail at a criminal trial, it should come as no surprise to discover that officers do the same in § 1983 cases in which, in essence, it is the officer who is on trial. Further compounding the threat that testilying poses to the interests of justice in § 1983 cases is the additional fact that “most jurors are predisposed to credit officers’ testimony.”¹⁹²

In light of the frequent threat of evidentiary disparities in deadly force cases, the pervasive police Code of Silence against incriminating colleagues in both investigations and testimony, and the lax investigation efforts like those found in the Philadelphia Police Department, it becomes apparent that courts are severely hampered in their ability to fully and accurately assess the totality of the circumstances in § 1983 actions involving the police use of deadly force.

B. *Temporal Focus of the Reasonableness Inquiry*

1. The Consideration of Pre-Seizure Conduct

Another area where the court enjoys latitude in determining what constitutes the totality of the circumstances lies in distinguishing, in a temporal sense, the relevant sequence of events of a deadly force encounter. As the IAO Report on officer-involved shootings in Philadelphia observed, while the vast majority of police shootings are ultimately found to be “reasonable,”¹⁹³ in numerous instances these justifiable shootings are preceded by the pursuit of tactics by police officers that fall below departmental or generally accepted standards for police behavior. If the pursuit of these tactics is permitted to be considered as part of the § 1983 reasonableness inquiry, as opposed merely to the decision to shoot, the judiciary’s ability to affect police behavior is likely to increase.

190. *Id.*

191. Anthony Flint, *Bratton Calls ‘Testilying’ by Police a Real Concern*, BOSTON GLOBE, Nov. 15, 1995, at 1 (quoting a speech given by NYPD Commissioner William Bratton).

192. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 548 (1993); see also Daniel Wise, *Brutality Cases Tough to Prosecute*, N.Y. L.J., May 29, 1992, at 1.

193. IAO REPORT, *supra* note 14, at 8.

For example, the IAO Report found that forty-eight percent of the intentional shooting incidents it reviewed were preceded by, or occurred during, foot pursuits.¹⁹⁴ While foot pursuits are a common—and some would argue an indispensable—tactic in law enforcement, the Report cited numerous instances in which “officers rushed unwittingly into dangerous situations, without a plan or course of action, without assessing their personal safety or that of other officers or the public.”¹⁹⁵ Often these foot pursuits were accompanied by partner splitting, an “unacceptably high risk tactic” in which “two [officer] teams deliberately divide up to pursue one or more suspects.”¹⁹⁶ In such cases, “poor judgment and tactics placed the officers in unnecessarily exposed and vulnerable positions, virtually assuring the fact that deadly force would be the officer’s only option if the situation escalated.”¹⁹⁷

Although the PPD’s Directive 10 governing the use of deadly force does emphasize officers’ responsibility to “ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by taking unnecessary, overly aggressive, or improper actions,”¹⁹⁸ the Department “has no policy pertaining to, does not monitor or review, and offers virtually no training in foot pursuits.”¹⁹⁹ While the PPD is not unique in this regard, foot-pursuit policies are becoming increasingly common.²⁰⁰ A report by the International Association of Chiefs of Police recently endorsed foot-pursuit policies, concluding: “It is often better that a suspect should escape than that an officer should take unnecessary risks that could pose unreasonable danger to officers and others.”²⁰¹

But does the pursuit of a tactic that “precipitate[s] the use of deadly force” amount to a violation under § 1983? As a principal matter, it is important to note that merely demonstrating a viola-

194. *Id.* at 65.

195. *Id.* at 62.

196. *Id.* at 62–63.

197. *Id.* at 63.

198. *Id.* at 62 (quoting PPD Directive 10).

199. *Id.* at 65.

200. For instance, a similar report on officer-involved shootings in Portland, Oregon, recently led to the adoption of a foot-pursuit policy for the Portland Police Bureau. POLICE ASSESSMENT RESOURCE CENTER, THE PORTLAND POLICE BUREAU: OFFICER-INVOLVED SHOOTINGS AND IN-CUSTODY DEATHS, FIRST FOLLOW-UP REPORT (2005), http://www.parc.info/client_files/Portland/Follow-up/1%20-%202005%20Portland%20Report-Final.pdf; *see also* CITY OF CINCINNATI POLICE DEPT., PROCEDURE MANUAL § 12.536 (2008), <http://www.cincinnati-oh.gov/police/pages/-5960-/12536.pdf> (detailing Cincinnati Police Department’s foot-pursuit policy as of March 11, 2008).

201. IAO REPORT, *supra* note 14, at 65–66.

tion of departmental policy does not satisfy the § 1983 standard for unreasonable use of deadly force. Instead, a plaintiff must establish a constitutional violation under the standards set forth in *Garner* and *Graham*.²⁰² And while that analysis tends to focus on the reasonableness of the officer's conduct "at the moment" of the decision to shoot,²⁰³ numerous plaintiffs have attempted to adjust the temporal focus of the inquiry to include *pre-seizure conduct*.²⁰⁴ In essence, these plaintiffs argue that the officer's unreasonable actions or tactics *created* a situation in which the ultimate decision to use deadly force was necessary—and therefore objectively reasonable.²⁰⁵ According to this argument, while the officer's ultimate decision to pull the trigger may be reasonable, the overall "seizure" is not.

The majority of the nation's circuit courts have considered whether pre-seizure conduct should bear on the "reasonableness" inquiry in deadly force cases, though the results are widely disparate.²⁰⁶ The divergence arises largely over uncertainty as to what constitutes the "totality of the circumstances," a phrase largely unelaborated upon in *Garner* and *Graham*.²⁰⁷ Although the Supreme Court has never tackled the issue directly, two general models of interpretation have emerged: One model interprets the "totality of the circumstances" narrowly in accordance with the "at the moment" language in *Graham*, and therefore excludes consideration of pre-seizure conduct in assessing reasonableness. This "frozen" time frame model has been adopted in the Second, Fourth, Sixth, and Eighth Circuits.²⁰⁸ The second model reads the "totality of the circumstances" broadly and concludes that pre-seizure conduct *is* relevant to the reasonableness determination. The First, Third, Seventh and Tenth Circuits subscribe to this "expansive" time

202. See, e.g., *Smith v. Freland*, 954 F.2d 343, 346–47 (6th Cir. 1992) ("[T]he issue is whether [the officer] violated the Constitution, not whether he should be disciplined by the local police force."); *Medina v. Cram*, 252 F.3d 1124, 1131–32 (10th Cir. 2001); *Mettler v. Whitley*, 165 F.3d 1197, 1202 (8th Cir. 1999); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994), *cert. denied*, 515 US 1159 (1995); *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992).

203. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

204. See, e.g., *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999).

205. See PATRICK AND HALL, *supra* note 29, at 37.

206. See Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651, 665–75 (2004).

207. See *id.* at 655 (referring to the "totality of circumstances" language in *Graham v. Connor* and the struggle of courts to apply it).

208. See *infra* notes 211–221 and accompanying text.

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frame model.²⁰⁹ Other circuits fall somewhere between these two poles.²¹⁰

2. The Frozen Model

According to the “frozen” model, courts are required to limit the reasonableness inquiry to the precise moment of the shooting. Some courts draw this conclusion directly from the Supreme Court’s narrow language in *Graham*. In *Greenidge v. Ruffin*, for instance, plaintiff-appellant argued that the district judge’s decision to exclude evidence of the officer’s pre-seizure conduct, consisting of a failure to use a flashlight at night and have proper backup—both violations of departmental policy—constituted reversible error.²¹¹ The Fourth Circuit disagreed, holding: “[t]he [*Graham*] Court seemed to have relied upon the ‘split-second judgments’ that were required to be made and focused on the reasonableness of the conduct ‘at the moment’ when the decision to use force was made.”²¹² Therefore, *Graham* “contradicts appellants’ argument that, in determining reasonableness, the chain of events ought to be traced backward to the officer’s misconduct of failing to comply with the standard police procedures.”²¹³ Consequently, the evidence was not considered probative to the reasonableness of the officer’s decision to fire shots at the suspect.²¹⁴

Another authority commonly cited in support of the “frozen” model is *California v. Hodari D.*, in which the Supreme Court held

209. See *infra* notes 222–233 and accompanying text.

210. The Fifth and Eleventh Circuits align closer to the frozen model. See, e.g., *Menuel v. City of Atlanta*, 25 F.3d 990, 995 (11th Cir. 1994) (analyzing the circumstances of the shooting itself separately from those leading up to the shooting); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275 (5th Cir. 1992), *cert. denied*, 506 U.S. 973 (1992) (stating that the question of appropriateness of force used in attempting arrest is different from that of force used in self-defense while attempting arrest); *Young v. City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985) (distinguishing between the officer’s use of deadly force and creation of circumstances resulting in such use in determining whether the victim’s rights were violated). But see *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (concluding that an officer’s legitimate fear of retaliation against unjustified physical abuse committed by the officer does not preclude liability for shooting). The Ninth Circuit aligns closer to the expansive model. See *Billington v. Smith*, 292 F.3d 1177, 1190–91 (9th Cir. 2002) (stating that defensive use of deadly force may be rendered unreasonable if the officer recklessly or intentionally provokes a violent response).

211. 927 F.2d 789, 791 (4th Cir. 1991).

212. *Id.* at 792.

213. *Id.*

214. *Id.*; see also *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996).

that the defendant, who dropped a rock of cocaine while fleeing the police, had not been “seized” for purposes of the Fourth Amendment at the time he dropped the drugs.²¹⁵ The Court said, “An arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority.”²¹⁶ Because a “seizure” does not occur until the subject “yields,” therefore, the Eighth Circuit has held in multiple cases that conduct prior to the officer’s decision to impose deadly force upon the subject is not part of the “seizure.”²¹⁷ This conduct is consequently excluded from the reasonableness inquiry. The Eighth Circuit likewise applies this reasoning when the plaintiff claims that the officer “created the need to use the force ultimately used,” and when the plaintiff alleges that the officer “should have responded in a different manner, or . . . should have used a lesser degree of force.”²¹⁸ The Second²¹⁹ and Sixth²²⁰ Circuit interpretations are similar, though the Sixth Circuit applies a more “segmented” approach to the analysis.²²¹

3. The Expansive Model

The expansive model emphasizes the “totality” portion of the “totality of the circumstances” analysis from *Garner* and *Graham*. The Third Circuit provided perhaps the best-developed argument in support of this broad notion of “totality” in *Abraham v. Raso*.²²² In *Abraham* the court expressed explicit disagreement with circuits that exclude evidence of events preceding the actual seizure, saying:

[W]e do not see how these cases can reconcile the Supreme Court’s rule requiring examination of the ‘totality of the circumstances’ with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. ‘Totality’ is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer’s use of force.²²³

215. 499 U.S. 621, 629 (1991).

216. *Id.* at 626 (emphasis omitted).

217. *See* *Cole v. Bone*, 993 F.2d 1328, 1332–33 (8th Cir. 1993).

218. *Schulz v. Long*, 44 F.3d 643, 648–49 (8th Cir. 1995).

219. *See* *Salim v. Proutlx*, 93 F.3d 86, 92 (2d Cir. 1996).

220. *See* *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996).

221. *See id.* at 1161; *Claybrook v. Birchwell*, 274 F.3d 1098, 1103 (6th Cir. 2001).

222. 183 F.3d 279, 291–92 (3d Cir. 1999).

223. *Id.* at 291.

The court continued by demonstrating the difficulty of applying the “frozen” model:

How is the reasonableness of a bullet striking someone to be assessed if not by examining preceding events? . . . Under at least some interpretations of *Hodari*, [the suspect] evidently was not seized until after the bullet left the barrel and actually struck him. If we accept both this interpretation . . . as well as the rule that pre-seizure conduct is irrelevant, then virtually every shooting would appear unjustified, for we would be unable to supply any rationale for the officer’s conduct.²²⁴

Finally, the court held that while some events are too attenuated for consideration, “what makes these prior events of no consequence are ordinary ideas of causation, not doctrine about when the seizure occurred.”²²⁵

The First Circuit, in holding that actions of an officer leading up to a shooting are relevant, likewise attacked other courts’ interpretations of *Hodari*.²²⁶ The court acknowledged *Hodari*’s holding that a seizure has not occurred until a suspect yields, but interpreted Supreme Court doctrine as holding that “once it has been established that a seizure has occurred, the court should examine the actions of the government officials leading up to the seizure.”²²⁷ This interpretation was based on an earlier Supreme Court decision, *Brower v. County of Inyo*, in which the Court held that the construction of a police roadblock designed to “seize” a fleeing suspect could be considered unreasonable.²²⁸ Although the First Circuit subsequently rejected the notion that officers have a duty to avoid

224. *Id.* (citation omitted).

225. *Id.* at 292. It should be pointed out, however, that a recent Third Circuit decision calls into question the force of the holding in *Abraham*. In *Grazier ex rel. White v. City of Philadelphia*, the court emphasized that *Abraham* ultimately left for another day how to reconcile the disagreement over pre-seizure conduct and decided the case on other grounds. 328 F.3d 120, 127 (3d Cir. 2003). Consequently, in *Grazier*, the court ruled that the district court had not erred in refusing a jury instruction that would have allowed a finding of unreasonableness when “[an officer’s] improper conduct creates the situation making necessary the use of deadly force.” *Id.* Judge Becker dissented, saying: “I would decide [the] issue by holding that if the officer’s conduct unreasonably creates the need to use deadly force in self-defense, that conduct may render the eventual use of deadly force by the officer unreasonable in violation of the Fourth Amendment.” *Id.* at 129 (Becker, J., dissenting). Becker also insisted that the general holding of *Abraham*, “the relevance of officers’ pre-seizure conduct to determining whether use of force during the seizure is excessive,” was undisturbed. *Id.*

226. See *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995).

227. *Id.*

228. See 489 U.S. 593, 599 (1989).

creating situations that increase the risk of the use of deadly force, it nonetheless reiterated that “the pre-confrontation actions themselves could theoretically serve as the unreasonable conduct on which a § 1983 claim is based.”²²⁹

Despite the fact that the Tenth Circuit generally recognizes that pre-seizure conduct is relevant to the “totality of the circumstances” analysis,²³⁰ the court has limited this analysis in recent years. In *Medina v. Cram*, the court emphasized that “in order to constitute excessive force, the conduct arguably creating the need for force must be immediately connected with the seizure and must rise to the level of recklessness, rather than negligence.”²³¹

Finally, the Seventh Circuit’s interpretation, though now aligned with the expansive model, has also been inconsistent. In earlier cases the court segmented each possible Fourth Amendment violation into a separate analysis, with only the officer’s conduct in the ultimate seizure being subject to the reasonableness inquiry.²³² However, recently, the court has endorsed a more expansive approach, saying: “[t]he totality of the circumstances cannot be limited to the precise moment when [the officer] discharged his weapon.”²³³

4. An Argument for the Expansive Model

The preceding discussion indicates that even those circuits that have firmly adopted one model or the other nonetheless struggle to specify what police conduct may properly be considered in conducting the reasonableness inquiry. Professor Michael Avery argues persuasively that the First and Third Circuits’ expansive model is both easier to implement and more faithful to the spirit of *Garner* and *Graham* than the frozen model.²³⁴ Avery contends that “the efforts of other courts to draw fine lines around the moment of a seizure, and to exclude as irrelevant other factors, break down in

229. *Napier v. Town of Windham*, 187 F.3d 177, 188 (1st Cir. 1999).

230. *See, e.g., Myers v. Okla. County Bd. of County Comm’rs*, 151 F.3d 1313, 1319–20 (10th Cir. 1998); *Allen v. Muskogee*, 119 F.3d 837, 840 (10th Cir. 1997); *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995).

231. 252 F.3d 1124, 1132 (10th Cir. 2001).

232. *See Tom v. Volda*, 963 F.2d 952, 956 (7th Cir. 1992); *Carter v. Buscher*, 973 F.2d 1328, 1332–33 (7th Cir. 1992).

233. *Deering v. Reich*, 183 F.3d 645, 649 (7th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999).

234. Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of the Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 267–70, 275–77, 287 (2003).

the absence of any principled justification for where the lines ought to be drawn.”²³⁵

Avery attributes this analytical breakdown to the frozen model’s mistaken interpretation of the “at the moment” language from *Graham*.²³⁶ According to Avery’s analysis, the Court mentioned the phrase “at the moment” not to narrow the scope of the “totality” inquiry so as to exclude pre-seizure conduct, but rather to “distinguish between judging an officer’s actions from his perspective at the time of the incident and judging them later on the basis of ‘20/20 hindsight.’”²³⁷ This distinction constitutes one of the key holdings in *Graham*, whereas the role of an officer’s pre-seizure conduct is not discussed.²³⁸ Avery concludes, therefore, that the expansive model is more faithful to *Garner* and *Graham*, which emphasized the “totality of the circumstances,” and that when courts try to reconcile this “totality” with the narrow focus of the frozen model, the analysis tends to collapse into uncertainty.²³⁹ Avery’s cogent analysis sensibly distills the interpretive flaws of the frozen model and provides perhaps the best case-driven argument for adopting the expansive model.

5. The Supreme Court Weighs In (Or Doesn’t)

In 2007, the Supreme Court had an opportunity to resolve the discrepancy among the circuits on the role of pre-seizure conduct in a deadly force case, yet it ultimately neglected to address the issue. In *Scott v. Harris*, the Court overturned the Eleventh Circuit’s decision that an officer who rammed his police cruiser into the back of the plaintiff’s car during a high speed chase was not entitled to summary judgment.²⁴⁰ The Eleventh Circuit found that “[n]one of the antecedent conditions for the use of deadly force existed in this case” and that “there is no question that there were alternatives for a later arrest.”²⁴¹

Although one Justice at oral argument suggested the possibility that the officer’s pursuit had created the need to use deadly force,²⁴² the Court ultimately reversed, holding that the officer’s

235. *Id.*

236. *See id.* at 280.

237. *Id.*

238. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989); Avery, *supra* note 234, at 280.

239. Avery, *supra* note 234, at 287.

240. 127 S. Ct. 1769, 1778 (2007).

241. *Harris v. Coweta County*, 433 F.3d 807, 815 (11th Cir. 2005).

242. *See Linda Greenhouse, Justices Take Up Police Use of Lethal Force*, N.Y. TIMES, Feb. 27, 2007, at A4. Justice Ginsburg observed at oral argument: “[i]f the

use of deadly force to eliminate the risk to the public was reasonable.²⁴³ Further, the Court rejected the notion that the police might have eliminated the risk by ceasing their pursuit, refusing “to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people’s lives in danger.”²⁴⁴ As the *Scott* decision cannot be seen as either an endorsement of the consideration of pre-seizure conduct nor an outright rejection, the role of pre-seizure conduct in the reasonableness inquiry remains unclear.

6. Pre-Seizure Conduct and Police Culture: The Numbers Game

As is the case with fact asymmetry in deadly force cases, aspects of contemporary police culture tend to augment the significance of a court’s failure to take account of pre-seizure conduct. Police cultural norms manifest themselves in this context in the contemporary departmental focus on arrest statistics, or what Skolnick and Fyfe call the “the police numbers game.”²⁴⁵ In this era of statistics-based policing, Skolnick and Fyfe argue, “police are locked in a means/ends syndrome, in which [the police] tell us how often they employ the tools they have been provided to achieve their goals rather than whether the goals themselves have been achieved.”²⁴⁶ As arrest statistics are utilized as the primary measure for distinguishing between “good cops” and “bad cops” for purposes of promotion, those who make more arrests are perceived to be “better,” while those officers skilled enough to resolve disputes without resorting to force or arrest are often overlooked.²⁴⁷ From this, patrol officers “learn that their supervisors are interested only in the figures on their activity reports, not in what the police may have done to put them there.”²⁴⁸ When this attitude prevails, officers are understandably more willing to take great risks, sometimes in disregard of departmental policy or even the Constitution, in order to appease their superiors.

This conclusion is reflected in the IAO Report on officer-involved shootings in Philadelphia. In examining the factors that mo-

police weren’t after him, there is no indication that he would have been speeding.”
Id.

243. *Scott*, 127 S. Ct. at 1778.

244. *Id.* at 1779.

245. SKOLNICK & FYFE, *supra* note 3, at 125.

246. *Id.*

247. *Id.* at 127. Indeed, Skolnick and Fyfe suggest that “good cops do their jobs so well that it may appear to the distant connoisseur of statistics that they are not even needed.” *Id.*

248. *Id.* at 190.

tivate officers to engage in unsound and unsafe tactics like partner splitting and foot pursuits—tactics that make the resort to deadly force more probable—the Report principally identifies (1) peer pressure, and (2) the department’s system of rewards and incentives.²⁴⁹ Regarding peer pressure, the Report states: “Officers, supervisors, and commanders believe that ‘getting the bad guy’, *at any cost*, is expected of them. Many fear criticism or appearing weak if they fail to take aggressive police actions, *despite unreasonable risks*.”²⁵⁰ More instructive still is the Report’s conclusion about the PPD’s system of rewards and incentives:

PPD commanders are under constant pressure to improve officer activity and arrest statistics. Officers who make numerous arrests are rewarded by their commanders with desirable assignments, favorable evaluations, and recommendations for Heroism and Valor commendations These factors do not create a climate or culture that encourages careful scrutiny of the officer’s judgment and tactics.²⁵¹

The Report concludes that such a system “encourages poor tactics.”²⁵² When these poor tactics are permitted and the arrests they produce rewarded, it is hardly surprising that officers pursue them in ways that make the use of deadly force more likely, all in an effort to “get the bad guy.” Additionally, when reviewing courts are unwilling to hold officers and departments accountable for conduct that hastens the resort to deadly force—by incorporating pre-seizure conduct into the reasonableness analysis, for instance—§ 1983 is gutted of its potency.

7. Incorporating Pre-Seizure Conduct into the Reasonableness Inquiry

The question remains, how should a consideration of pre-seizure conduct factor into the “reasonableness” inquiry in a § 1983 suit? On one hand, an approach that held unreasonable an officer’s pursuit of tactics encouraged and even required by his superiors would be manifestly unfair. Moreover, negligent violations of departmental policy cannot serve as the basis for finding a constitutional violation. On the other hand, however, the *Garner* decision and its effect on law enforcement demonstrated that the courts can and do play an important role in affecting the behavior of police departments. As noted above, following *Garner*, many police de-

249. See IAO REPORT, *supra* note 14, at 63–64.

250. *Id.* at 64 (emphasis added).

251. *Id.*

252. *Id.*

partments chose to draw deadly force policies within the constitutional bounds.²⁵³

Accordingly, by expanding the temporal sequence of events available for consideration in the reasonableness inquiry to include pre-seizure conduct, it is plausible that courts can bring about changes that, to date, police departments have been reluctant to implement. For instance, were a court to deny summary judgment to an officer when it determined that the officer's pre-seizure actions contributed significantly to a deadly force encounter, one could expect police departments to scrutinize more closely the tactics that led to such an encounter. Indeed, faced with the prospect of having to pay large settlements to plaintiffs who are successful on motions for summary judgment in such cases, any rational municipality would conceivably review whether tactics like foot pursuits and partner splitting truly represent the most effective means of policing, or whether, instead, less costly tactics might be implemented. Moreover, such an approach has the added benefit of restoring to the analysis the doctrinal notion of causation that Avery insists is missing from the frozen model's approach.²⁵⁴

C. Punitive Focus on Individual Officers

The final feature of § 1983 lawsuits that constrains judicial oversight over the unreasonable use of deadly force is the doctrine's focus on remedying the conduct of individual officers rather than of police departments as a whole, a phenomenon reflected in the limited range of available remedies. Plaintiffs who demonstrate a constitutional violation are entitled to compensatory damages for harm caused, plus punitive damages from individual officers if it is shown that the defendants acted willingly, deliberately, maliciously, or with reckless disregard for the plaintiff's rights.²⁵⁵ Nevertheless, there remain numerous barriers that prevent plaintiffs from gaining meaningful recovery on the one hand, and likewise prevent police departments from instituting internal reforms on the other. Chief among these barriers are the qualified immunity defense, the

253. See *supra* notes 83–85 and accompanying text.

254. See Avery, *supra* note 234, at 287 (“Dividing a single incident into a series of ‘segments,’ or limiting relevant factors to those ‘immediately’ connected with a seizure, lacks the doctrinal justification that the causation standard supplies.”); Abraham v. Raso, 183 F.3d 279, 292 (3d Cir. 1999) (arguing that ideas of causation, rather than doctrine, should determine whether prior events were of any consequence).

255. See Cheh, *supra* note 34, at 265.

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high bar for establishing municipal liability, and the unavailability of injunctive relief.

1. Qualified Immunity as a Bar to Recovery

First, the qualified immunity defense presents an obstacle to liability even when an officer has acted unreasonably. An officer is entitled to qualified immunity “where the officer got it wrong but where his mistakes . . . were reasonable.”²⁵⁶ Observers point out that this additional inquiry often confounds juries:

To most jurors hearing a jury instruction on the defense of qualified immunity, it simply sounds as if the officer should not be found liable if he thought [subjectively] he was behaving lawfully, and many jurors will give him the benefit of the doubt on that issue, even if they think his conduct was improper.²⁵⁷

When combined with an unsympathetic plaintiff, the jury’s tendency to trust the law enforcement officer, and the oft-mistaken belief that any damages award will come from the officer’s personal assets, the qualified immunity standard presents a significant barrier to a plaintiff’s recovery, even when an officer’s actions were unreasonable.

2. Municipal Liability and Failure to Train Claims

Perhaps the qualified immunity bar would not be so significant were it not for the even more challenging standard for demonstrating municipal liability. In *Monell*, the Supreme Court was unwilling to impose municipal liability on the common-law basis of *respondeat superior*.²⁵⁸ Instead, a plaintiff must demonstrate a policy or custom that caused a violation of his constitutional rights.²⁵⁹ Such a causal connection is difficult to prove. In *City of Los Angeles v. Heller*, for instance, the Supreme Court held that, even if “departmental regulations might have *authorized* the use of constitutionally excessive force,” the plaintiff is not entitled to damages on a municipal liabil-

256. *Armacost*, *supra* note 38, at 470; *see also* *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (finding that an officer is entitled to the immunity defense if he or she makes a reasonable mistake about what the law requires); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that government officials performing discretionary functions are generally granted immunity as long as they are acting reasonably).

257. *Federal Response to Police Misconduct: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 34 (1992) (statement of Judge Jon O. Newman, United States Court of Appeals for the Second Circuit).

258. *See Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978).

259. *See id.* at 690–91.

ity claim without first proving that the individual officer committed a constitutional harm.²⁶⁰ Moreover, municipalities may only be held liable for acts that the municipality has officially sanctioned or ordered.²⁶¹ Further, “only those municipal officials who have ‘final policymaking authority,’” as determined by state law, “may by their actions subject the municipality to § 1983 liability.”²⁶²

Municipal liability claims often arise on a “failure to train” theory. According to this theory, even when a department maintains constitutional policies, if its officers are trained in a way such that the policy is routinely disregarded, leading to unconstitutional practices, the municipality should be liable. In *City of Canton v. Harris*, the Supreme Court erected a high burden for proving “failure to train” liability, holding that “the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference for the rights of persons with whom the police come into contact.”²⁶³ It is not enough to establish that a particular officer was inadequately trained, nor that an otherwise adequate training program was negligently administered.²⁶⁴ Instead, a plaintiff must identify a particular deficiency in the training program and demonstrate that this deficiency represented the “moving force” behind the constitutional violation.²⁶⁵

As an example, the Court stated that providing officers with firearms while failing to train them as to the constitutional limitations on the use of deadly force would certainly result in municipal liability.²⁶⁶ Justice O’Connor, in concurrence, raised an additional basis for liability when “policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion . . . [that] could put the municipality on notice that its officers confront the particular situations on a regular basis, and that they often react in a manner contrary to constitutional requirements.”²⁶⁷ Nonetheless, this standard is extremely difficult to meet, and successful “failure to train” claims are extremely rare.²⁶⁸

260. 475 U.S. 796, 799 (1986).

261. See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)).

262. *Id.*

263. 489 U.S. 378, 388 (1989).

264. *Id.* at 391.

265. *Id.* at 389.

266. See *id.* at 390 n.10.

267. *Id.* at 397 (O’Connor, J., concurring).

268. See *Armocost*, *supra* note 38, at 472.

Avery argues that courts' unwillingness to consider an individual officer's policy violations and training runs counter to the spirit of the "totality of the circumstances" test.²⁶⁹ Specifically, he points out that in the context of determining probable cause for a criminal arrest, the Supreme Court's "totality of circumstances" analysis "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them."²⁷⁰ Circuit courts have held similarly, concluding that the totality of the circumstances in the criminal context is to be viewed "from the perspective of a prudent police officer and *in light of the police officer's training and experience*."²⁷¹ Conversely, in the civil context, an officer's failure to follow procedures consistent with training is "often passed off as mere negligence, an insufficient basis for a civil rights claim."²⁷² Arguing against this criminal-civil distinction, Avery concludes: "What an officer is taught in training should be viewed as part of the equipment he takes with him into the field."²⁷³ When that training is found to be deficient, such departmental failures would conceivably bear on the reasonableness of the officer's decision to use deadly force.

The IAO Report on officer-involved shootings in Philadelphia discusses significant training deficiencies that raise further concerns about the courts' narrow "failure to train" standard. Specifically, the Report found that "[t]he PPD's in-service firearms training programs do not adequately prepare officers for the realities and challenges of policing in today's urban environment."²⁷⁴ Although initial recruit firearms training was exemplary, "PPD officers do not receive ongoing and adequate in-service training in the areas of strategic response, tactics, and the judgment skills necessary to prepare officers for the critical incidents that they could confront."²⁷⁵ Furthermore, while the departmental annual requirements comply with state standards, the Report points out that other

269. See Avery, *supra* note 234, at 287–88.

270. United States v. Arvizu, 534 U.S. 266, 273 (2002).

271. United States v. Kayode, 254 F.3d 204, 209 (D.C. Cir. 2001) (emphasis added); see also United States v. Patterson, 292 F.3d 615, 626 (9th Cir. 2002); United States v. Sparks, 291 F.3d 683, 688 (10th Cir. 2002); United States v. Neumann, 183 F.3d 753, 756 (8th Cir. 1999); United States v. Price, 599 F.2d 494, 501 (2d Cir. 1979).

272. Avery, *supra* note 234, at 289; see also Ewolski v. City of Brunswick, 287 F.3d 492, 516 (6th Cir. 2002); Salim v. Proulx, 93 F.3d 86, 92 (2d Cir. 1996).

273. Avery, *supra* note 234, at 289.

274. IAO REPORT, *supra* note 14, at 72.

275. *Id.* at 73.

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departments, like the NYPD, voluntarily supplement state requirements with additional firearms training.²⁷⁶

Moreover, the Report found that “firearms training is currently provided in antiquated and inferior facilities that have not been significantly upgraded in over 50 years.”²⁷⁷ Such inadequate facilities “not only reduce the effectiveness of the training, but they also send the message that high quality firearms training is not a priority.”²⁷⁸ While maintaining a shoddy building for firearms training certainly does not rise to the level of a constitutional violation, such a deficiency could conceivably contribute to an argument that the department’s approach to firearms training represents “deliberate indifference.”²⁷⁹

3. Unavailability of Injunctive Relief

Finally, injunctive relief is almost never available to plaintiffs proceeding individually in § 1983 actions. Recall that in *Rizzo v. Goode*, the Supreme Court held that plaintiffs alleging only a handful of instances of abuse in the Philadelphia Police Department did not have the requisite stake in the outcome to force an overhaul in police procedures.²⁸⁰ Later, in *City of Los Angeles v. Lyons*,²⁸¹ the Court set what Masy M. Cheh describes as a “dramatic and almost impossible threshold for obtaining an injunction” in a case challenging the LAPD’s use of the carotid chokehold as an arrest mechanism.²⁸² The plaintiff sought an injunction barring the use of the hold, which was alleged to routinely threaten serious injury and loss of life in situations when deadly force was not justified.²⁸³ Although Lyons could seek compensatory damages for the injury he incurred, the Court held, he lacked standing to seek an injunction unless he could show “a real and immediate threat of again being illegally choked.”²⁸⁴ Neither the past injury nor the mere possibility of future injury satisfied the requirements for establishing Article III standing.²⁸⁵

According to this interpretation, *no* plaintiff in Los Angeles would have standing to enjoin the department’s use of chokeholds,

276. *Id.* at 74.

277. *Id.* at 76.

278. *Id.* at 77.

279. *See City of Canton v. Harris*, 489 U.S. 378, 390–91 (1989).

280. 423 U.S. 362, 372 (1976).

281. 461 U.S. 95 (1983).

282. Cheh, *supra* note 34, at 266.

283. *Lyons*, 461 U.S. at 98.

284. *Id.* at 110.

285. *See id.* at 110–11.

as “[b]y the time the plaintiff brings suit, the injury-causing actions will have ceased and the plaintiff will be unable to show that she will face a risk of injury in the future.”²⁸⁶ The consequences of *Lyons*, argues Cheh, are such that “individual plaintiffs do not have effective legal means to enjoin widespread and continuing police violence.”²⁸⁷

4. Limited Remedies and Police Culture: The Rotten Apple Syndrome

One aspect of police culture in particular—the so-called “rotten apple” syndrome—significantly reinforces both the punitive focus on individual officers as well as judicial reluctance to impose sweeping remedies such as injunctions or municipal liability in § 1983 suits. Simply, the “rotten apple” syndrome consists of “the nearly universal reaction by local politicians and chiefs of police to publicized incidents of policy brutality . . . as isolated, aberrant acts of rogue cops whose criminal conduct does not reflect on either the leadership or the rest of the rank and file.”²⁸⁸ Examples of this tendency to portray violators as “rogue cops” abound, including the NYPD reactions to both the Abner Louima and Amadou Diallo incidents.²⁸⁹ Likewise, LAPD Chief Daryl Gates called the Rodney King beating an “aberration.”²⁹⁰ The Christopher Commission later proved those officers’ conduct as less an aberration than symptomatic of a trend within the department.²⁹¹

The “rotten apple” syndrome and the courts’ reluctance to impose municipal liability reinforce one another in a perverse cycle that perpetuates systemic, toxic features of organizational police culture. When departments and local governments depict incidents of police brutality as isolated occurrences, it provides cover for a court to erect high standards for municipal liability. Correspondingly, when courts limit the § 1983 inquiry to the officer’s individual conduct, it frees the department and city to scapegoat the most egregious offenders while simultaneously shielding numerous less-publicized offenders who receive no such scorn.²⁹² In sum, as both an individual- and incident-specific inquiry, the § 1983 suit

286. Armacost, *supra* note 38, at 492.

287. Cheh, *supra* note 34, at 266.

288. Armacost, *supra* note 38, at 458.

289. *See id.* at 457–58. (“Police Commissioner Safir declared that the officers involved in the [Louima] affair were ‘bad apples’ who are spoiling the reputation of the New York police Mayor Giuliani termed the shooting [of Amadou Diallo] an isolated incident.”).

290. *Id.* at 458.

291. *See generally* CHRISTOPHER COMMISSION, *supra* note 182.

292. Armacost, *supra* note 38, at 493–94.

fails to provide judges and juries with “the information that would be most helpful in identifying sick police departments.”²⁹³ In closing their eyes to the organizational features of the daily activities of a police department, courts ensure that a policy, practice, or custom constituting a violation will be extremely difficult to find. A collateral consequence of this willful blindness, argues Barbara E. Armacost, is that “judges—and juries even more so—have no good way to draw lines separating bad police violence from police violence that is regrettable but justified.”²⁹⁴

The limited nature of remedies available in § 1983 suits may owe to the fact that the statute was never intended to produce widespread policy change within police departments. However, as the § 1983 cause of action has emerged as the primary means for checking the activities of law enforcement, one is left to question whether the citizenry would be better served if the judiciary were to adapt the nature of the inquiry from one focused on individual decision making to one that more closely scrutinizes the organizational role of the police department and police culture in generating individuals’ decisions.

V.

THE LANDSCAPE OF REFORM

A. *Incremental, Not Drastic Change*

In considering how to remedy some of these limitations on judicial oversight of the use of deadly force, a few potential strategies emerge. One possible but unlikely solution would involve drastically overhauling the § 1983 legal standards. By lowering the municipal liability standard to *respondeat superior*, by diminishing the force of the qualified immunity defense, and by easing the *Lyons* bar on injunctions, one could expect courts to take a much harder look at the relationship between departmental policies and culture and their effect on the police use of deadly force on the street.

However, there are likewise good reasons why such drastic changes should be resisted. As Patrick and Hall explain: “Given the choice between the safety of law enforcement officers—whom we hire to protect us—and the safety of criminal suspects who choose to assail them, the law clearly strikes the balance in favor of the officer.”²⁹⁵ In many ways, this is as it should be. Law enforcement

293. *Id.* at 476.

294. *Id.* at 477.

295. PATRICK & HALL, *supra* note 29, at 25–26.

officers represent “the line of last resort” in American society,²⁹⁶ “charged with the protection and preservation of that society and community for the benefit of all—themselves included.”²⁹⁷ The officer’s life is at risk on every beat, every assignment. Acknowledging this reality, it would be a crime of the highest order were the legal system to completely abandon police officers in their most desperate hour of need.

Nevertheless, as has been demonstrated, in certain respects the law at present is ill-equipped to account for severe organizational deficiencies in contemporary policing. Specifically, courts should develop methods for incorporating aspects of organizational police culture that heavily influence officer decision making into § 1983 analysis. Despite widespread scholarly and institutional recognition of these cultural phenomena, as demonstrated by the findings of the Mollen and Christopher Commissions, for instance, courts continue to lag in their willingness to acknowledge the effect of police culture on the officer on his beat. As Armacost observes: “[p]olice officers are organizationally imbedded in a way that virtually redefines their individual decision-making processes.”²⁹⁸ Consequently, to the extent that the contemporary legal structure “ignore[s] or undervalue[s] institutional and organizational factors,”²⁹⁹ the status quo focus on individual officers’ actions will continually fail to address the “systemic features of the police organization [that] permit, sanction, or even encourage the officers’ violent behavior.”³⁰⁰

B. *Recent, Effective Solutions*

Recent years have seen some alternative solutions to this problem emerge outside the context of § 1983 litigation. For instance, Congress in 1994 invested the Department of Justice with a cause of action to obtain injunctive relief against departments marred by patterns of police misconduct.³⁰¹ The statute, enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, empowers the DOJ to sue for equitable and declaratory relief when it has reasonable cause to believe that a law enforcement agency is engaged in a “pattern or practice” that deprives persons of “rights,

296. Chevigny, *supra* note 150, at 85.

297. PATRICK & HALL, *supra* note 29, at 192.

298. Armacost, *supra* note 38, at 457.

299. *Id.* at 456.

300. *Id.*

301. *See* 42 U.S.C. § 14141 (2000).

privileges, or immunities secured or protected by the Constitution or laws of the United States.”³⁰²

In short, the statute directly redresses the barrier established by *Rizzo v. Goode*, and, in the past decade, § 14141 has proven to be a very promising development. Already, the federal government has used the statute to investigate an array of law enforcement departments, resulting in consent decree settlement agreements in at least nine departments.³⁰³ These consent decrees typically require departmental compliance to improve areas such as training, investigations, and monitoring, though each is specifically tailored to remedy the deficiencies within the department.³⁰⁴ For instance, a 2002 consent decree in the Cincinnati Police Department specifically altered the use of force standard and outlawed the carotid chokehold, a result that no individual plaintiff could achieve after *Lyons*.³⁰⁵ The consent decrees typically last for terms of four to five years, and compliance is monitored by an independent auditor who reports on the department’s progress periodically.³⁰⁶ Barring modifications in the § 1983 standards, consent decrees present the best hope for gaining departmental change through litigation.

One other creative alternative solution is for plaintiffs in § 1983 suits to demand departmental change as a condition of litigation settlement agreements. For example, in Oakland, California, 119 citizens joined together in suing the Oakland Police Department in 2000, alleging that four officers known as the “Riders” had made false arrests, planted evidence, and used illegitimate force against them, and that the department was liable for its deliberate indifference to this ongoing misconduct.³⁰⁷ To avoid costly litigation, the City of Oakland initiated settlement negotiations

302. *Id.*; see also Livingston, *supra* note 127.

303. See U.S. Dep’t of Justice, Civil Rights Div., Special Litig. Section, Findings Complaints Settlements, “Conduct of Law Enforcement Agencies Settlements and Court Decisions,” <http://www.usdoj.gov/crt/split/findsettle.htm#Police%20Misconduct%20Settlements> (last visited Sept. 4, 2008) (providing a list of DOJ investigations and settlements with various police departments). Since 1994, the DOJ has initiated consent decrees with Pittsburgh, PA; Steubenville, OH; the State of New Jersey; Los Angeles, CA; Washington, D.C.; Buffalo, NY; Detroit, MI; Cincinnati, OH; and Mt. Prospect, IL. *Id.*

304. See Livingston, *supra* note 127, at 821–40.

305. See Memorandum of Agreement between the U.S. Dep’t of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Dep’t (Apr. 12, 2002), <http://www.usdoj.gov/crt/split/Cincmoafinal.htm>.

306. See Livingston, *supra* note 127, at 826.

307. See OAKLAND POLICE DEP’T, NEGOTIATED SETTLEMENT AGREEMENT, FIRST SEMI-ANNUAL REPORT 9 (2003), <http://www.oaklandpolice.com/agree/1smarpt.PDF>.

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which resulted in a voluntary consent decree not unlike those procured by the Department of Justice.³⁰⁸ The agreement focuses on improving police procedures in a wide range of areas, including discipline, field supervision, use of force, and training; the agreement further provided that the department would be monitored by an independent auditor to ensure compliance.³⁰⁹ This strategy allows plaintiffs to gain some form of injunctive relief where it would otherwise be unavailable. However, as the benefits of such relief fall largely to those disconnected from the litigation, it is incumbent upon plaintiffs' lawyers to encourage their clients to see beyond their own self-interest and pursue the widespread institutional changes that such reforms offer.

VI. CONCLUSION

Ultimately, in attempting to effectively restrain the unreasonable use of deadly force, there is no substitute for high-quality police leadership and management. As Philadelphia's disparate experiences with Frank Rizzo and John Timoney demonstrate, when officers are well trained under coherent policies and when discipline is enforced against violators, the rank-and-file will fall into line. Conversely, when those at the top emphasize ignorance of the law and unrestrained force, when discipline is lax, or when there is a lack of direction altogether—as many feel was the case most recently under Sylvester Johnson—police misconduct is permitted to flourish, and public confidence and trust in law enforcement suffer. Such conditions provide a recipe for civil unrest.

This Note questions the judiciary's ability to exercise oversight over the police use of deadly force. However, it is not meant to deny the courts' critical role in the process. Section 1983 was initially designed to provide individual redress from constitutional violations carried out by government officials. Yet, whether intended or not, few can deny that § 1983 has emerged as the primary means by which the judiciary monitors the executive branch's unmatched power to enforce the law. The response of police departments around the country to the Supreme Court's decision in *Garner* striking down the "fleeing felon" rule irrefutably demonstrates the significance of this power. Consequently, when lingering deficiencies in the judiciary's doctrinal approach to the police use of deadly force exist—such as the dramatic evidentiary asymmetry that typi-

308. *See id.*

309. *See id.* at 10.

fies these cases and the refusal to consider pre-seizure conduct in determining reasonableness—it is imperative that these deficiencies be identified and solutions sought. Rather than shy from its supervisory role, the judiciary should embrace the kind of active involvement in law enforcement championed in *Tennessee v. Garner*. As this Note has aimed to demonstrate, the costs of doing nothing, of permitting the unmonitored use of deadly force to persist, are real and substantial.

In all, however, while the courts can offer a measure of supplemental oversight, much of the necessary changes in police culture must be generated from within the police infrastructure. Police departments must shift from a culture of obfuscation and deception, as exemplified by the code of silence, testilying and the rotten apple syndrome, to one of transparency and honesty. Moreover, departments should move away from the numbers game and deemphasize the importance of arrest statistics, which tend to induce the pursuit of dangerous, risk-creating tactics. Instead, police management must stress smart, safe tactics that achieve the correct balance between pursuing suspects and protecting officers, bystanders, and society. The successful efforts of the NYPD since the 1990s and of John Timoney in both Philadelphia and Miami to reduce crime and restore confidence in the police demonstrate that such change is possible. One would hope that enough capable and willing police leaders exist that this change can occur on a widespread scale. If not, however, it is essential that the nation's courts have adequate tools at their disposal to provide effective oversight over police organizations. As this Note demonstrates, in the context of the police use of deadly force, this, unfortunately, is not presently the case.